# THE GENERAL STATUTES OF NORTH CAROLINA

## ANNOTATED

## 1995 CUMULATIVE SUPPLEMENT

## Volume 3

### Chapters 8 through 14

*Prepared under the Supervision of*

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

*Under the Direction of*

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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.**

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# Preface

This Cumulative Supplement to Volume 3 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

# User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

# Scope of Volume

**Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapters 8 through 14 of the General Statutes.

**Annotations:**

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
North Carolina Central Law Journal through Volume 21, p. 178.
Opinions of the Attorney General.

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# The General Statutes of North Carolina
# 1995 Cumulative Supplement

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## VOLUME 3

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**Cited** in Continental Tel. Co. v. Gunter, 99 N.C. App. 741, 394 S.E.2d 228 (1990).

### § 8-4. Judicial notice of laws of United States, other states and foreign countries.

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**Traffic Laws of South Carolina.** — Trial court did not err in taking judicial notice of similarity between South Carolina impaired driving statutes and North Carolina statute. Sykes v. Hiatt, 98 N.C. App. 688, 391 S.E.2d 834 (1990).

**Quoted** in State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994).

## ARTICLE 2.

## *Grants, Deeds and Wills.*

**§ 8-20:** Repealed by Session Laws 1993, c. 288, s. 1, effective July 6, 1993, and applicable to assignments made on or after that date.

**Cross References.** — For present provision concerning use of certified registered copies as evidence, see § 47-31.

**Editor's Note.** — Session Laws 1993, c. 288, which repealed this section effective upon ratification, July 6, 1993, in s. 5 provided that the act applied to assignments made on or after that date.

## ARTICLE 3A.

## *Findings, Records and Reports of Federal Officers and Employees.*

### § 8-37.1. Finding of presumed death.

(a) A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to made such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. This subsection applies only to findings of presumed death made prior to the effective date of Section 5(b) of Public Law 89-554.

(b) A written finding of presumed death, made by the Secretary pursuant to Chapter 10 of Title 37 of the U.S. Code, P.L. 89-554 as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office, or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances, and place of his disappearance. This subsection applies only to findings of presumed death made on or after the effective date of Section 5(b) of Public Law 89-554. (1945, c. 731, s. 1; 1995, c. 379, s. 3.)

**Effect of Amendments.** — The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, added the subsection (a) designation; added the last sentence of subsection (a); and added subsection (b).

## ARTICLE 4.

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### § 8-44.1. Hospital medical records.

CASE NOTES

**Admissibility of Hospital Records, etc. —**

In accord with the main volume. See In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

### § 8-45. Itemized and verified accounts.

CASE NOTES

I. In General.

I. IN GENERAL.

**Cited** in Forsyth County Hosp. Auth. v. Sales, 82 N.C. App. 265, 346 S.E.2d 212 (1986); Roy Burt Enters., Inc. v. Marsh, 328 N.C. 262, 400 S.E.2d 425 (1991).

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## *Life Tables.*

### § 8-46. Mortuary tables as evidence.

CASE NOTES

**Tables Need Not Be Specially Put in Evidence. —**

In accord with third paragraph in the main volume. See Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

**Applied** in Livingston v. United States, 817 F. Supp. 601 (E.D.N.C. 1993).

**Quoted** in Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

**Cited** in Fortune v. First Union Nat'l Bank, 323 N.C. 146, 371 S.E.2d 483 (1988).

## ARTICLE 7.

## *Competency of Witnesses.*

### § 8-50. Parties competent as witnesses.

**Legal Periodicals. —**

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

## § 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

(a) In the trial of any criminal action or proceeding in any court in which the question of parentage arises, regardless of any presumptions with respect to parentage, the court before whom the matter may be brought, upon motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged-parent defendant cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent is not the natural parent; whereupon, the court shall enter the special verdict of not guilty; and

(2) By requiring the State or defendant, as the case may be, requesting the blood tests and comparisons pursuant to this subsection to initially be responsible for any of the expenses thereof and upon the entry of a special verdict incorporating a finding of parentage or nonparentage, by taxing the expenses for blood tests and comparisons, in addition to any fees for expert witnesses allowed per G.S. 7A-314 whose testimonies supported the admissibility thereof, as costs in accordance with G.S. 7A-304; G.S. Chapter 6, Article 7; or G.S. 7A-315, as applicable.

(b) Repealed by Session Laws 1993, c. 333, s. 2, effective October 1, 1993.

(b1) In the trial of any civil action in which the question of parentage arises, the court shall, on motion of a party, order the mother, the child, and the alleged father-defendant to submit to one or more blood or genetic marker tests, to be performed by a duly certified physician or other expert. The court shall require the person requesting the blood or genetic marker tests to pay the costs of the tests. The court may, in its discretion, tax as part of costs the expenses for blood or genetic marker tests and comparisons. Verified documentary evidence of the chain of custody of the blood specimens obtained pursuant to this subsection shall be competent evidence to establish the chain of custody. Any party objecting to or contesting the procedures or results of the blood or genetic marker tests shall file with the court written objections setting forth the basis for the objections and shall serve copies thereof upon all other parties not less than 10 days prior to any hearing at which the results may be introduced into evidence. The person contesting the results of the blood or genetic marker tests has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure. If no objections are filed within the time and manner prescribed, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. The results of the blood or genetic marker tests shall have the following effect:

(1) If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the test, is that the probability of the alleged parent's parentage is less than eighty-five percent (85%), the alleged parent is presumed not to be the parent and the evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence;

(2) If the experts disagree in their findings or conclusions, the question of paternity shall be submitted upon all the evidence;

(3) If the tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is between eighty-five percent (85%) and ninety-seven percent (97%), this evidence shall be admitted by the court and shall be weighed with other competent evidence;

(4) If the experts conclude that the genetic tests show that the alleged parent is not excluded and that the probability of the alleged parent's parentage is ninety-seven percent (97%) or higher, the alleged parent is presumed to be the parent and this evidence shall be admitted. This presumption may be rebutted only by clear, cogent, and convincing evidence. (1949, c. 51; 1965, c. 618; 1975, c. 449, ss. 1, 2; 1979, c. 576, s. 1; 1993, c. 333, s. 2; 1993 (Reg. Sess., 1994), c. 733, s. 1.)

**Effect of Amendments.** — The 1993 (Reg. Sess., 1994) amendment, effective August 1, 1994, and applicable to civil actions commenced on or after that date, substituted the present fifth, sixth, and seventh sentences of subsection (b1), beginning "Any party objecting" and ending "authenticity or accuracy" for "The testing expert's completed and certified report of the results and conclusions of the paternity blood test or genetic marker test is admissible as evidence without additional testimony by the expert if the laboratory in which the expert performed the test is accredited for parentage testing by the American Association of Blood Banks. Accreditation may be established by verified statement or reference to published sources. Any person contesting the results of a blood or genetic marker test has the right to subpoena the testing expert pursuant to the Rules of Civil Procedure."

## CASE NOTES

***Editor's Note.** — The cases represented by the following annotations were decided under this section as it stood before the 1993 amendment, which provides for the admissibility of a certified report of the results of a paternity blood* *test or genetic marker test without additional expert testimony, and assigns weight to such evidence according to the probability of parentage.*

**Scope of Section.** — This section authorizes blood tests only upon motion made by either the State or the defendant, and the court involved in the matter must order the test. The statute does not authorize the indiscriminate taking of blood, nor does it allow the performance of a blood test by anyone than a trained technician or anywhere other than a medical facility. State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

**Former subdivision (b)(1) of this section (see now subsection (b1)) was applicable to civil actions only;** the statute which applies to criminal actions is subdivision (a)(1). State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

**Section Not Applicable in Rape Case.** — This section applies only where "the question of parentage arises." A question of parentage is not central to a charge of rape. Thus, the commands of this section are inapplicable in a rape case. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

**Inconsistent Results Allowed.** — This statute simply provides that when test results are consistent and show the defendant not to be the father of the child, the jury is required to return a special verdict of not guilty. Nothing in this statute prohibits the admission into evidence of inconsistent results. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

**Varying Results of Blood Tests.** — Court did not err by admitting the result of blood tests showing the probability of defendant's fathering the child to be 99.54%, even though it varied greatly from the result of blood tests performed by another laboratory showing the probability of paternity to be only 93.75%. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

**Default Judgment Barred Right to a Blood Test.** — Because a default judgment conclusively established defendant's paternity, defendant having failed to appeal the default judgment or make a timely motion under Rule 59(a)(8) of the Rules of Civil Procedure, res judicata barred the granting of defendant's motion for blood testing. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

## § 8-50.2. Results of speed-measuring instruments; admissibility.

(a) The results of the use of radio microwave, laser, or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding for the purpose of corroborating the opinion of a person as to the speed of an object based upon the visual observation of the object by such person.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a radio microwave, laser, or other electronic speed-measuring instrument are not admissible in any proceeding unless it is found that:

(1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing him to operate the speed-measuring instrument from which the results were obtained.

(2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.

(3) The instrument employed was approved for use by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

(c) All radio microwave and other electronic speed-measuring instruments shall be tested for accuracy by a technician possessing at least a second-class or general radiotelephone license from the Federal Communications Commission or a certification issued by organizations or committees endorsed by the Federal Communications Commission within a period of 12 months prior to the alleged violation. A written certificate by such technician showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

All laser speed enforcement instruments shall be tested in accordance with standards established by the Commission. The Commission shall provide for certification of laser speed enforcement instruments. A written certificate by a technician certified by the Commission showing that a test was made within the required testing period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

(d) In every proceeding where the results of a radio microwave, laser, or other speed-measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio microwave and other speed-measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments. (1979, 2nd Sess., c. 1184, s. 3; 1983, c. 34; 1987, c. 318; c. 827, s. 60; 1994, Ex. Sess., c. 18, s. 1.)

**Effect of Amendments.** — The 1994 Extra Session amendment, effective March 18, 1994, in subsections (a), (b) and (d) substituted "microwave, laser," for "microwave"; and added the second paragraph of subsection (c).

## § 8-53. Communications between physician and patient.

**Legal Periodicals.** —

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

For article, "What's the Harm in Asking?: A Discussion of Waiver of the Physician-Patient Privilege and Ex Parte Interviews with Treating Physicians," see 19 N.C. Cent. L.J. 1 (1990).

For comment on the prohibition of ex parte contacts with a plaintiff's treating physician, see 13 Campbell L. Rev. 233 (1991).

For note, "Restricting Ex Parte Interviews with Nonparty Treating Physicians: Crist v. Moffatt," see 69 N.C.L. Rev. 1381 (1991).

### CASE NOTES

I. General Consideration.
II. Nature and Scope of Privilege.
III. Waiver.
IV. Compelled Disclosure.

### I. GENERAL CONSIDERATION.

**Purpose of Section.** —

In accord with second paragraph in the main volume. See Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

**Proper Administration of Justice.** — This section sets forth the procedure to compel disclosure of information which ordinarily is protected by the doctor-patient privilege. Such information may be disclosed by order of the court if in the opinion of the trial judge disclosure is necessary to the proper administration of justice. This decision is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling. State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992).

**Disclosure if Necessary to a Proper Administration of Justice.** — Although a witness may be impeached by a showing of mental deficiency as it bears upon the witness' credibility, medical records for treatment purposes are privileged and the contents of such records may be disclosed only if, in the opinion of the trial court, disclosure is necessary to a proper administration of justice. State v. Adams, 103 N.C. App. 158, 404 S.E.2d 708 (1991).

**For discussion of distinction between statutory physician-patient privilege and rule prohibiting unauthorized ex parte contacts** with patient's nonparty treating physicians, see Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

**Defense counsel may not interview medical malpractice plaintiff's nonparty treating physicians privately** without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in § 1A-1, Rule 26. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

**Applied** in Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990).

**Cited** in Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); Crist v. Moffatt, 92 N.C. App. 520, 374 S.E.2d 487 (1988).

### II. NATURE AND SCOPE OF PRIVILEGE.

**Qualified Privilege.** — The privilege established by this section is not absolute, but qualified. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

### III. WAIVER.

**Privilege May Be Waived.** —

A patient may waive the privilege under this section; the waiver may be express or implied. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

A patient may expressly or impliedly waive his physician-patient privilege during discovery and at trial. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

**The privilege is waived by implication where, etc.** —

In accord with the main volume. See Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

**Plaintiff May Not Waive Privilege as to Information But Not as to Other Matters.** — When the patient breaks the fiduciary relationship with the physician by revealing, or permitting revelation of, the substance of the information transmitted to the physician, the patient has, in effect, determined that it is no longer important that the confidences which the privilege protects continue to be protected. Having taken this position, the plaintiff may not silence the physician as to matters otherwise protected by the privilege. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

**Such as Opinions.** — There is no statutory basis for allowing a patient to waive his privilege as to information gained by his physician while maintaining it as to his physician's opinions. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

When a patient dissolves the fiduciary relationship with his physician by disclosing or permitting disclosure of details of their consultations, he should not, in fairness, be allowed to prevent the physician from stating an opinion which might aid the trier of fact in assessing the merits of the patient's case. To hold otherwise would enable patients to use the privilege not defensively to protect their confidences but offensively to suppress the truth in litigation. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

**Following Waiver, Plaintiff May Not Prohibit Physicians from Testifying for Defendant.** — A plaintiff who has waived his physician-patient privilege as to nonparty treating physicians may not preclude these physicians from testifying as experts for the defendant. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

Once a plaintiff waives his right to prohibit disclosures of confidences by his physicians, he may not assert the physician-patient privilege to prevent them from testifying as experts for his opponent. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

### IV. COMPELLED DISCLOSURE.

**Trial Judge May Compel Disclosure. —**

In accord with third paragraph in the main volume. See State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

The trial court may compel the physician or surgeon to disclose communications and information obtained by him if in the judge's opinion the same is necessary to a proper administration of justice. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

**But Only as to Matters Necessary to Proper Administration of Justice.—**

This section ăffords the trial judge wide discretion in determining what is necessary for a proper administration of justice. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

**Child Abuse Cases.** — By virtue of §§ 8-53.2 and 7A-551, the physician-patient privilege, created by § 8-53 is not available in cases involving child abuse. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Any privilege which the defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to this section was nullified by §§ 8-53.1 and 7A-551. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Disclosure Properly Compelled. —**

Where the trial court received evidence and heard arguments before ruling that the privilege should be waived and the testimony allowed into evidence, the record failed to establish that this ruling could not have been the result of a reasoned decision. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

## § 8-53.1. Physician-patient privilege waived in child abuse.

**Legal Periodicals. —**

For article, "What's the Harm in Asking?: A Discussion of Waiver of the Physician-Patient Privilege and Ex Parte Interviews with Treating Physicians," see 19 N.C. Cent. L.J. 1 (1990).

### CASE NOTES

**This section is to be read in pari materia, etc. —**

In accord with the main volume. See State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Section applies irrespective of when the medical information was obtained.** — Section 7A-551 and this section plainly facilitate the prosecution of child abusers, without regard to whether the medical information was obtained before or after the accused was officially charged with a crime. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Evidence That Defendant Sought Treatment of Sexually Transmitted Disease.** — Any privilege which defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to by § 8-53 was nullified by this section and § 7A-551. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

## § 8-53.2. Communications between clergymen and communicants.

**Legal Periodicals. —** For note on the clergy-communicant privilege, see 65 N.C.L. Rev. 1390 (1987).

### CASE NOTES

**Expectation of Trust and Confidentiality in Covered Communications. —** The legislature's excision of the term "confidential" from the current version of this statute was clearly not intended to broaden application of the privilege to all genre of general conversation with one's spiritual mentor, but merely to broaden the range of advisory and counseling practices to which it applies. The expectation of trust and confidentiality inherent in communications covered under the prior statute was not affected by the legislature's modification in 1967 of that statute's wording. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

**No Discretion in Court to Compel Disclosure When Privilege Exists. —** The 1967 amendment to this section revealed the General Assembly's intent to remove from the trial courts any discretion to compel disclosure when the clergy-communicant's privilege exists. State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986).

**Privilege Held Inapplicable. —** This section was not applicable where the person to whom defendant confided was not an ordained or licensed minister of any church and did not hold any office in any church, although he had preached from the pulpit several times and had taught Sunday school, and where the court found that the defendant did not make statements while seeking spiritual comfort and guidance, but that they were conversational statements in which he confided to a friend. State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986).

Where preacher, who had told defendant's wife the day before that defendant needed help and that he was going to try to help him, sought out defendant for that purpose, and meeting attended by defendant, preacher and the preacher's wife was not one in which defendant had any reason to expect confidentiality, as the conversation appeared to be one in which the preacher was offering his advice and counsel, but not one in which defendant's admissions were entrusted to him in pursuit of such counsel and advice, this section did not apply. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

## § 8-53.3. Communications between psychologist and client or patient.

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 44 of Chapter 7A, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (1967, c. 910, s. 18; 1983, c. 410, ss. 3, 7; 1987, c. 323, s. 2; 1993, c. 375, s. 2; c. 553, s. 78.)

**Legal Periodicals.** — For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

**Testimony Proper Where No Privilege Existed.** — Where defendant to a charge of first-degree sexual offense telephoned a clinical psychologist and made an appointment, but doctor recognized a conflict of interest because she was also treating defendant's wife and stepdaughters, doctor telephoned defendant to refer him to another psychologist, and defendant then stated to her that he had been seduced by his stepdaughter, the trial court, by allowing this testimony and compelling disclosure over defendant's objection on the basis that it was "necessary to the proper administration of justice" as allowed by this section, acted properly, since under the second paragraph of this section the psychologist-patient privilege did not exist. State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424, cert. denied, 325 N.C. 230, 381 S.E.2d 789 (1989).

**Cited** in State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

## § 8-53.8. Counselor privilege.

No person, duly licensed pursuant to Chapter 90, Article 24, of the General Statutes, shall be required to disclose any information which he or she may have acquired in rendering professional counseling services, and which information was necessary to enable him or her to render professional counseling services: Provided, that the presiding judge of a superior or district court may compel such disclosure, if in the court's opinion the same is necessary to a proper administration of justice and such disclosure is not prohibited by other statute or regulation. (1983, c. 755, s. 2; 1993, c. 514, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 514, s. 4 is a severability clause.

Session Laws 1993, c. 514, s. 5 provides that the Board's rule-making authority under the act is effective upon ratification of the act. The act was ratified July 24, 1993.

**Effect of Amendments.** — The 1993 amendment, effective July 1, 1994, substituted "licensed" for "registered".

CASE NOTES

**Cited** in State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

## § 8-54. Defendant in criminal action competent but not compellable to testify.

### CASE NOTES

I. General Consideration.
III. Cross-Examination of Defendant.
  B. Particular Areas of Inquiry.
IV. Defendant Not Testifying.
  B. Fact Commented On.

### I. GENERAL CONSIDERATION.

**Applied** in State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

**Cited** in State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Griffin, 109 N.C. App. 131, 425 S.E.2d 722 (1993); State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994); State v. Thompson, 118 N.C. App. 33, 454 S.E.2d 271 (1995).

### III. CROSS-EXAMINATION OF DEFENDANT.

#### B. Particular Areas of Inquiry.

**And Specific Acts of Misconduct, etc. —**

By choosing to testify, a defendant is subject to cross-examination as other witnesses; defendant waived his privilege against self-incrimination regarding bad acts when he elected to testify. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Where defendant testified on direct examination that he had no intent of selling cocaine until he was approached by the informant, he raised the issue of entrapment, and § 8C-1, Rule 404(b) allowed the State on cross-examination to question defendant concerning the prior sale to undercover police to prove absence of entrapment; therefore defendant's privilege against self-incrimination was not violated by the questions. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Where defendant first testified that he had never possessed any cocaine, it was then proper impeachment for the district attorney to ask the defendant about bags containing cocaine residue found in the defendant's possession when he was arrested. State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991).

### IV. DEFENDANT NOT TESTIFYING.

#### B. Fact Commented On.

**Comment by Court. —**

Any comment or explanation by the parties or the court on a defendant's election not to testify is improper. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

**New Trial Ordered.** — Defendant was entitled to a new trial because the trial court erroneously overruled his objection to the prosecution's closing comments about defendant's decision not to testify in trial for felonious breaking or entering; the error was prejudicial and required a new trial. State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993).

**Veiled Reference to Defendant's Failure to Testify.** — Trial judge did not err in failing to intervene ex mero motu where any reference by the district attorney to defendant's failure to testify was at the most "a veiled reference," so brief and indirect as to make improbable any contention that the jury inferred guilt from the failure of the defendant to testify. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

**Prosecutor's calling the jury's attention to defendant's demeanor** made no reference to or inference about his decision not to testify, and did not violate his constitutional and statutory privilege not to testify. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

**Comment by Defense Counsel on Defendant's Failure to Testify.** — Defense counsel was entitled to read to the jury that clause of U.S. Const., Amend. V material to his election not to testify, i.e., "No person … shall be compelled in any criminal case to be a witness against himself" and to say simply that because of this provision, the jury must not consider defendant's election not to testify adversely to him, or words to this effect. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

**Comments Elicited by Defense Counsel.** — Trial court did not err in allowing police officer's comments on murder defendant's decision to exercise her constitutional right to remain silent upon her arrest; the comments were elicited by the defense counsel and defense counsel repeatedly asked officer to explain his answers and did not object to, or move to strike the comments. State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993), cert. denied, — U.S. —, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1994).

**Prohibiting Defense from Reading U.S. Const., Amend. V to the Jury Held Not Reversible Error.** — The trial court did not commit reversible error in prohibiting the reading to the jury of that portion of U.S. Const., Amend. V pertinent to the defendant's election not to testify, where in his general instructions to the jury, the judge gave an accurate and complete statement of the law applicable to defendant's election not to testify. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

**Prosecution's statements directed at defendant's failure to produce rebuttal or alibi evidence** at trial for robbery with dangerous weapon, were not directed at defendant's failure to testify on his own behalf; therefore, these comments were not in error. State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

## § 8-56. Husband and wife as witnesses in civil action.

### CASE NOTES

I. General Consideration.

### I. GENERAL CONSIDERATION.

**Federal law and North Carolina law on spousal privilege are in sharp conflict.** Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

**Applicability of Federal Privilege Law in Federal Case with Pendent State Claims.** — In a federal question case with pendent state law claims, where the issue is discoverability of evidence which is relevant to federal and state law claims, any conflict between federal and state privilege law must be resolved in favor of the body of federal law favoring admission of the evidence. Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

**Severance of State Law Claims from Federal Case so as to Preserve State Privilege.** — In a federal question case with pendent state law claims, where the issue is admissibility of evidence at trial which is relevant to a federal question and to a pendent state law claim, the court must apply federal privilege law. However, because of liberal discovery, the court and the parties can intelligently choose whether to give effect to state privilege law by severing the trial of the state law claims in federal court or dismissing the state law claims so that they can be tried in state court. Walker v. Lewis, 127 F.R.D. 466 (W.D.N.C. 1989).

## § 8-57. Husband and wife as witnesses in criminal actions.

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 initially provided that the act, which amended subsection (b), would become effective October 1, 1986, and expire October 1, 1988, but that the expiration date would not affect the term or authority of a grand jury constituted at that time. Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 1, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, extended the expiration date of Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, to October 1, 1993. Subsequently, Session Laws 1991, c. 686, s. 3, amended Session Laws 1985, c. 843, s. 6, as amended by Session Laws 1987, c. 1040, so as to delete the October 1, 1991 expiration provision. However, the 1991 amendment, which was in the coded bill drafting format set out at G.S. 120-20.1, did not mention or take account of Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4.

## CASE NOTES

I. General Consideration.

### I. GENERAL CONSIDERATION.

**Evidence rendered incompetent by this section is excludable** and failure to do so is reversible error. State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

**Privilege Belongs to Spouse.** — Under subsection (b) of this section, the privilege belongs to the spouse, not to the defendant. Once challenged, the better practice is for the trial judge to advise the spouse that he or she cannot be compelled to testify in cases where this statute applies, and then to determine whether the spouse is in fact still willing to testify. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

**The sole prohibition of subsection b is now directed to compelled testimony.** State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

**As amended in 1986, this section embodies the common law rule** that a defendant's spouse may be compelled to testify against a defendant for the State, and reflects judicial abrogation of the common law rule that a spouse is incompetent to testify against the defendant spouse. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

**The spousal privilege does not bar** nonconfidential, out-of-court statements made by a spouse and introduced against a defendant spouse for the State through a third party. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

Rationale of cases decided prior to State v. Freeman, 302 N.C. 591, 276 S.E.2d 450 (1981), holding that a spouse's out-of-court statments are inadmissible against the defendant spouse for the State, no longer applies. State v. Rush, 340 N.C. 174, 456 S.E.2d 819 (1995).

**This section preserves the rule against disclosure of confidential communications.** While this section modifies the rule against adverse spousal testimony, it preserves the rule against disclosure of confidential marital communications. State v. Holmes, 330 N.C. 826, 412 S.E.2d 660 (1992).

A confidential communication between husband and wife is privileged and that this privilege, even in criminal cases, survives both the North Carolina Rules of Evidence and the 1983 amendment to this section. The statute makes it clear that neither spouse may be compelled to disclose confidential communications between husband and wife when testifying as a witness. State v. Holmes, 330 N.C. 826, 412 S.E.2d 660 (1992).

**Defendant who asked third parties to leave before he spoke to his wife** in their home had the right to assert privilege against his wife and prohibit her from testifying both about his statements to her and about his actions in taking a gun out of a kitchen cabinet. State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

**Prejudicial Error Not Shown.** — Assuming, arguendo, that defendant's wife was compelled to testify against defendant, the error was not prejudicial, where she essentially corroborated other witnesses' testimony, and there was not a reasonable possibility that a different result would have been reached had she not testified. State v. Britt, 320 N.C. 705, 360 S.E.2d 660 (1987).

**Admission Not Marital Communication.** — Defendant's admission to his wife that he had sexual intercourse with his stepdaughter was not a marital communication induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship; rather, defendant's confession was driven by his own psychological motivations and was not a marital communication. State v. Smith, 113 N.C. App. 827, 440 S.E.2d 322 (1994).

**Applied** in State v. Josey, 328 N.C. 697, 403 S.E.2d 479 (1991); State v. Martin, 105 N.C. App. 182, 412 S.E.2d 134 (1992).

## § 8-57.1. Husband-wife privilege waived in child abuse.

**Legal Periodicals. —** For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

### Article 8.

### *Attendance of Witness.*

## § 8-59. Issue and service of subpoena.

In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. Provided that in criminal cases any employee of a local law-enforcement agency may effect service of a subpoena for the attendance of witnesses by telephone communication with the person named. However, in the case of a witness served by telephone communication pursuant to this section, neither an order to show cause nor an order for arrest shall be issued until such person has been served personally with the written subpoena. (1777, c. 115, s. 36, P.R.; R.C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C.S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3; 1971, c. 381, s. 5; 1981, c. 267; 1989, c. 262, s. 2.)

### Article 10.

### *Depositions.*

**§ 8-77:** Repealed by Session Laws 1995, c. 379, s. 9, effective July 6, 1995.

## § 8-83. When deposition may be read on the trial.

Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(1) If the witness is dead, or has become insane since the deposition was taken.
(2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial.
(3) If the witness is confined in a prison outside the county in which the trial takes place.
(4) If the witness is so old, sick or infirm as to be unable to attend court.
(5) If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.
(6) If the witness is the Governor of the State, or the head of any department of the State government, or the president

of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or district attorney of any court of record, and the trial shall take place during the term of such court.

(8) If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a time that such member is in the service of that body.

(9) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.

(11) Except in actions or proceedings governed by the Rules of Civil Procedure, if the witness is a physician duly licensed to practice medicine in the State of North Carolina, and resides or maintains his office outside the county in which the action is pending.

If any provision of this section conflicts with the Rules of Civil Procedure, then those Rules shall control in actions or proceedings governed by them. (1777, c. 115, ss. 39, 40, 41, P.R.; 1803, c. 633, P.R.; 1828, ch. 24, ss. 1, 2; 1836, c. 30; R.C., c. 31, s. 63; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; Code, s. 1358; 1905, c. 366; Rev., s. 1645; 1919, c. 324; C.S., s. 1821; 1965, c. 675; 1969, c. 44, s. 23; 1971, c. 381, s. 7; 1973, c. 47, s. 2; 1991, c. 491, s. 1.)

**Cross References.** — For the Rules of Civil Procedure, see § 1A-1.

## ARTICLE 13.

## *Photographs.*

### § 8-97. Photographs as substantive or illustrative evidence.

#### CASE NOTES

**Limiting Instruction.** — It would seem to be the better practice for a party wishing to limit the use of evidence offered by his opponent to request a limiting instruction at the time of its admission. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Where many if not all of the photographs which were received into evidence could properly have been considered by the jury as substantive evidence, for the trial judge to give a proper instruction limiting the State's exhibits to illustrative use would have required that the defendant specifically identify those exhibits which he contended were subject only to illustrative use. State v.

Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Defendant in robbery case argued that the judge erred in allowing the jury to view a videotape without first instructing them that it was admissible solely for the purpose of illustrating the victim's testimony; however, defendant did not request a limiting instruction, and since the State laid a proper foundation to introduce the videotape for either substantive or illustrative purposes, no limiting instruction was necessary. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 27, 387 S.E.2d 450 (1990).

**Admissibility of Videotape Recordings.** — The basic principles governing the admissibility of photographs apply also to motion pictures. Videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

**Videotapes generally are admissible into evidence** under North Carolina law for both illustrative and substantive purposes. Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds, Johnson v. Ruark Obstetrics & Assoc., 327 N.C. 283, 395 S.E.2d 85, rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

**Within Discretion of Court.** — A "day in the life" videotape of child allegedly injured by negligence of defendant hospital at the time of her birth was properly admitted. The plaintiffs' failure to provide notice to the opposing counsel and the trial court prior to taping did not render the tape inadmissible; rather, the admissibility of the videotape under the particular facts and circumstances of the action lay solely within the sound discretion of the trial court. Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987).

**Preview of Videotape.** — Where a videotape depicts conduct of a defendant in a criminal case, the trial judge should grant a request from the defense to preview the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

**Incriminating Statements in Videotape.** — If a videotape contains incriminating statements by the defendant, upon his objection, the judge must conduct a voir dire to determine the admissibility of any in-custody statements or admissions in the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

**For discussion of admissibility of maps, surveys and the like,** see Presley v. Griggs, 88 N.C. App. 226, 362 S.E.2d 830 (1987).

**Proper Authentication of Photographs.** — Where the witness clearly indicated that the photographs accurately portrayed what he had observed, the photographs were properly authenticated for illustrative purposes. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

**Foundation Held Sufficient.** — Where victim testified that the videotape was a factual representation of the events on the night of the robbery, the business had installed the camera approximately six weeks before the robbery, and that the camera was working properly before and after the night of the robbery, and on voir dire a police department detective testified that he had exclusive care and custody of the video camera film since the night of the robbery, there was sufficient evidence for the trial judge to find that the State had laid a proper foundation to introduce the videotape into evidence for either substantive or illustrative purposes. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

**Admission of Photographs Held Proper.** — Trial court's admission of nine photographs of victims' bodies was not error despite defendant's argument that photographs were repetitive and their relevancy was outweighed by their potential to inflame passions of the jury, since each autopsy photograph showed a different wound, and the photographs were not gory or gruesome. State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989).

Photographs of a hole which caused injury to a moped rider were properly admitted into evidence even though they were taken five months after the accident; there was no evidence in the record suggesting that conditions had changed between the time of the accident and the time the photographs were taken. Sellers v. CSX Transp., Inc, 102 N.C. App. 563, 402 S.E.2d 872 (1991).

**Quoted** in City of Statesville v. Cloaninger, 106 N.C. App. 10, 415 S.E.2d 111 (1992).

# Chapter 8B.

# Interpreters for Deaf Persons.

Sec.
8B-8. Compensation.

## § 8B-8. Compensation.

(a) An interpreter appointed under this Chapter is entitled to a reasonable fee for services, including waiting time, time reserved by the courts for the assignment, and reimbursement for necessary travel and subsistence expenses. The fee shall be fixed by the appointing authority who shall consider any fee schedule for interpreters established by the Department of Human Resources. Reimbursement for necessary travel and subsistence expenses shall be at rates provided by law for State employees generally.

(b) The fees and expenses of interpreters who serve before any superior or district court criminal and juvenile proceeding are payable from funds appropriated to the Administrative Office of the Courts.

(c) The fees and expenses of interpreters who serve in civil cases and special proceedings are also payable from funds appropriated to the Administrative Office of the Courts.

(d) Fees and expenses of interpreters who serve before a legislative body described in this Article are payable from funds appropriated for operating expenses of the General Assembly.

(e) Fees and expenses of interpreters who serve before any State administrative agency are payable by that agency.

(f) Fees and expenses of interpreters who serve before city or county administrative proceedings are payable by the respective city or county.

(g) Repealed by Session Laws 1995, c. 277, s. 1, effective July 1, 1995. (1981, c. 937, s. 1; 1989, c. 533, s. 5; 1995, c. 277, s. 1.)

**Effect of Amendments.** — The 1995 amendment, effective July 1, 1995, and applicable to compensation for services performed on or after that date, in subsection (a), added "time reserved by the courts for the assignment" in the first sentence, and substituted "established" for "recommended" in the second sentence; deleted the second sentence of subsection (e) regarding reimbursement for payments upon application to the Department of Human Resources; deleted the second sentence of subsection (f) regarding reimbursement for payments upon application to the Department of Administration during the 1981-83 fiscal biennium; and deleted subsection (g) requiring the Department of Administration and the Office of State Budget and Management to report and make recommendations to the 1983 General Assembly regarding funding this act.

# Chapter 8C.

# Evidence Code.

### Article 4.

### Relevancy and Its Limits.

Rule
404. Character evidence not admissible to prove conduct; exceptions; other crimes.

### Article 7.

### Opinions and Expert Testimony.

Rule
702. Testimony by experts.

## § 8C-1. Rules of Evidence.

### ARTICLE 1.

### *General Provisions.*

## Rule 103. Rulings on evidence.

### CASE NOTES

**Timely Objection Required.** — Where, at the time of defendant's objection to the admission of the envelope's contents, plaintiff had previously been permitted to testify about them without objection, defendant's objection was not raised in a timely manner. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

**Where a relevant response was not apparent from the context of the examination** defendant was precluded from predicating error upon the trial court's ruling on the State's objection to the question. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994).

**Waiver of Objection.** — Defendant waived any objection as to use of a witnesses' prior statements by using them extensively himself on cross-examination, and by failing to object to the use of the statements to refresh the witnesses' memory. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

**By failing to preserve evidence, etc.** — Where the defendant made no offer of proof regarding his proffered testimony and the significance of the excluded testimony was not obvious from the record, the defendant failed to preserve any issue concerning the exclusion of the testimony for appellate review. State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994).

**Applied** in State v. Baker, 106 N.C. App. 687, 418 S.E.2d 288 (1992); State v. Long, 113 N.C. App. 765, 440 S.E.2d 576 (1994); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

**Quoted** in State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993).

**Stated** in Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

**Cited** in State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994).

## Rule 104. Preliminary questions.

### CASE NOTES

**Declarant's Conflicting Statements.** — Where the hearsay statements of a declarant are conflicting the conflict creates a question of credibility and not one of reliability. Questions of credibility are to be determined by the jury. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

**Quoted** in State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994).

**Cited** in State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

## Rule 105. Limited admissibility.

**Legal Periodicals.** — For articles, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence", see 21 N.C. Cent. L.J. 1 (1995).

### CASE NOTES

**Cited** in State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992).

## Rule 106. Remainder of or related writings or recorded statements.

### CASE NOTES

**The Supreme Court frequently looks to federal decisions for guidance** with regard to the Rules of Evidence, and the lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

**Requirements.** — Federal decisions make clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

# ARTICLE 2.

# *Judicial Notice.*

## Rule 201. Judicial notice of adjudicative facts.

### CASE NOTES

**Sunset and Moon Phase.** — The trial court was not required to take judicial notice of the time of the sunset and the phase of the moon as reported in a local newspaper. State v. Canady, 110 N.C. App. 763, 431 S.E.2d 500 (1993).

**Distances Between Cities.** — Where an attorney sought to have a deposition admitted pursuant to Rule 32(a)(4) of the Rules of Civil Procedure by asserting that the witness was more than 100 miles from the place of trial, the trial court did not abuse its discretion by declining to take judicial notice of the distance between two cities. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

**Quoted** in State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994).

**Cited** in Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993).

## ARTICLE 4.

## *Relevancy and Its Limits.*

# Rule 401. Definition of "relevant evidence."

**Legal Periodicals.** — For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

## CASE NOTES

I. General Consideration.
II. Relevant Evidence.
III. Irrelevant Evidence.

### I. GENERAL CONSIDERATION.

**The court has interpreted this rule broadly** and has explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

**Applied** in State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992); Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992); In re Beck, 109 N.C. App. 539, 428 S.E.2d 232 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

**Quoted** in State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993); State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Cited** in State v. Hucks, 332 N.C. 650, 422 S.E.2d 711 (1992); State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993); State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); State v. Sierra, 335 N.C. 753, 440 S.E.2d 791 (1994); Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499, rehearing denied, 336 N.C. 786, 447 S.E.2d 424 (1994); Dennis v. Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104, temporary stay granted pending appeal, 336 N.C. 606, 445 S.E.2d 405, writ of superseadus granted, cert. granted, 336 N.C. 780, 447 S.E.2d 420, cert. granted, 337 N.C. 801, 449 S.E.2d 568 (1994); In re Will of Jones, 114 N.C. App. 782, 443 S.E.2d 363, cert. denied, 337 N.C. 693, 448 S.E.2d 526 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994).

### II. RELEVANT EVIDENCE.

**Amount of Damages in Personal Injury Action.** — Where the determination to be made in a personal injuries action was the amount of damages, any fact bearing on the degree or severity of injury sustained by plaintiff was properly admitted. Ferrell v. Frye, 108 N.C. App. 521, 424 S.E.2d 197 (1993).

**Although defendant pled guilty, videotape showing murder was admissible as it showed that the murder was committed for pecuniary gain** and that the murder was part of a course of conduct which included a crime of violence against another person. State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (1994).

**Evidence Pertaining to Parental Relations of Decedent in Wrongful Death Action.** — Evidence pertaining to disease of plaintiff's decedent and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which were in controversy in wrongful death action. The evidence was therefore relevant and should have been admitted on that ground. Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

**Evidence of Decedent's Drinking Habits Held Relevant.** — Although evidence of decedent's drinking habits did not by itself show that decedent knew defendant was under the influence, all of the evidence of decedent's drinking habits, along with the evidence of defendant's drinking on the day of the accident, established that decedent's prior use of alcohol and his knowledge of its effect was relevant on the issue of contributory negligence for riding with intoxicated driver. McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995).

**Evidence Held Relevant.** —

Photographs which showed numerous gunshot wounds were relevant to show not only the cause of death, but were also relevant as a means of proving the premeditation and deliberation elements of first-degree murder. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Where defense counsel attacked the professionalism of the conduct of the law enforcement officers who investigated the case, the evidence that defendant was read his Miranda rights according to law and that he indicated his understanding of them tended to refute the characterization of the officers' conduct as unprofessional and was therefore relevant. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

Evidence which tended to show that the defendant did not support his children and did not send them gifts following his wife's death tended to shed light upon the circumstances surrounding the shooting and tended to rebut the defendant's characterization of his relationship with his wife and children as a caring, supportive one and was thus relevant and admissible. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

Evidence that the defendant had escaped from jail was relevant and probative in that it tended to show the defendant's consciousness of his guilt. Furthermore, the threats made by defendant during the course of his escape were relevant to show the strength of his desire to escape. State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994).

Evidence regarding the issuance of a warrant for defendant's arrest for beating murder victim in the hour immediately preceding the murder tended to shed light on defendant's emotional state at or around the time of the killing and the circumstances surrounding that killing; thus, it was relevant and admissible. The testimony established intent and motive of returning to continue the assault and tended to prove premeditation, deliberation, and malice. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994).

Condensed videotape which included footage of a body being turned over, placed in a body bag and on a stretcher, then transported to elevator for removal was relevant to illustrate the crime scene prior to the arrival of medical personnel and was neither excessive nor cumulative evidence. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

The evidentiary fact that defendant was armed and hesitant to submit to arrest was not inconsequential and was relevant to the determination of his guilt in the murder. State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994).

Where the state's theory of case was that defendant had moved to county to act as the leader of a drug ring, and as such had ordered a "hit" on the victim, evidence demonstrating that defendant may have had alternative motivations in moving to the county was relevant. The testimony may have had the tendency to make the State's theory less plausible than it would have been without the testimony. State v. Wilson, 338 N.C. 244, 449 S.E.2d 391 (1994).

**Testimony Which Opens the Door to Otherwise Inadmissible Evidence.** — When defendant testified that he loved his wife and did not intend to kill her, the door was opened to questions by the State as to matters which would show the defendant did not love his wife, as evidenced by his affairs with other women. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

## III. IRRELEVANT EVIDENCE.

**Evidence Properly Excluded.** —

The trial court properly excluded exhibits which merely indicated plaintiff's legal position towards defendants and did not have a tendency to prove a fact at issue in the case. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, cert. granted, 338 N.C. 669, 453 S.E.2d 180 (1994).

Interjecting evidence which the defendant contended would allow the jury to infer his immaturity, and immaterial matter, so that the jury could make an additional leap to infer a fact of consequence, that he lacked capacity to form the requisite intent would have unnecessarily confused the issues, given the slight probative value of the contested evidence; therefore, even if this evidence was relevant and admissible, its exclusion was within the trial court's discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

**Evidence Held Irrelevant. —** The trial court did not abuse its discretion by not permitting cross-examination of witness in order to show the extent of the affectionate relations between defendant and the witness after a shooting. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

## Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

### CASE NOTES

**Probative Value Outweighed by Prejudicial Potential. —** Where officer saw two small bottles of liquor in a purse but had no reason to believe that alcohol consumption contributed to car accident the probative value of this evidence was outweighed by its prejudicial potential. Browning v. Carolina Power & Light Co., 114 N.C. App. 229, 441 S.E.2d 607, cert. granted, 337 N.C. 800, 449 S.E.2d 566 (1994).

**In order to establish the relevancy of blood test results,** plaintiff is required to lay a foundation by way of expert testimony explaining the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in this particular case. Further, the substance analyzed must be accurately identified by proving a chain of custody to insure that the substance came from the source claimed and that its condition was unchanged. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

**Psychiatric Testimony About Ability to Form Specific Intent in Murder Trial. —** Testimony of a psychiatric expert that in his opinion the defendant was suffering from organic brain impairment, that the defendant's capacity to plan, think or reflect was impaired at the time of the shootings, and that the defendant was incapable of forming the specific intent to kill at the time of the shootings was evidence tending to show that the defendant acted without premeditation or deliberation when he murdered victim and that he was incapable of forming the specific intent to kill when he shot his stepson and was therefore relevant in the defendant's trial for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

**Evidence Held Relevant. —** Plaintiffs failed to make a timely objection to the admission of a report prepared by financial consultant, which was listed by defendant in the "order on final pre-trial conference," thus affording plaintiffs ample time to prepare for a timely objection to the introduction of the exhibit at trial. Furthermore, the report was relevant since it tended to show the interconnected operations of the parties, the inadequacies of the financial record keeping, and the degree of control that plaintiffs exercised over one party. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Evidence regarding the issuance of a warrant for defendant's arrest for beating murder victim in the hour immediately preceding the murder tended to shed light on defendant's emotional state at or around the time of the killing and the circumstances surrounding that killing; thus, it was relevant and admissible. The testimony established intent and motive of returning to continue the assault and tended to prove premeditation, deliberation, and malice. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994).

Testimony that the victim was a very good person, always went to church, loved her children, was a good wife and mother and died not knowing what happened to her two-and-a-half year old child was properly admitted. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994).

**Evidence Held Irrelevant. —** Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of § 47C-4-110, for failure to put money in escrow, is not subject to criminal sanctions. State v.

Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Where plaintiff in paternity case did not contend that an operation which could produce the effects of recanalization was performed on defendant who had vasectomy, nor was there any evidence that such an operation was performed, the testimony on the procedure was irrelevant. Brooks v. Hayes, 113 N.C. App. 168, 438 S.E.2d 420 (1993).

Photographs of witness used to corroborate her allegations that defendant used the photographs to blackmail her to prevent her from testifying were admissible, but it was error to admit other photographs into evidence, not used for any purpose during the trial. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

**Testimony Which Opens the Door to Otherwise Inadmissible Evidence.** — When defendant testified that he loved his wife and did not intend to kill her, the door was opened to questions by the State as to matters which would show the defendant did not love his wife, as evidenced by his affairs with other women. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

**Applied** in State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995); State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995).

**Quoted** in State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992).

**Stated** in State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993).

**Cited** in State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994); Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499, rehearing denied, 336 N.C. 786, 447 S.E.2d 424 (1994); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995).

## Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

**Legal Periodicals.** —

For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

For note, "The Admissibility of Prior Acquittal Evidence — Has North Carolina Adopted the 'Minority View'? — The Effect of State v. Scott," see 16 Campbell L. Rev. 231 (1994).

For article, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence", see 21 N.C. Cent. L.J. 1 (1995).

### CASE NOTES

I. General Consideration.
II. Photographs and Videotapes.
III. Prejudicial Evidence, Evidence Excluded Based on Confusion, Etc.
IV. Admission or Exclusion of Evidence Not Prejudicial.

### I. GENERAL CONSIDERATION.

**Test for determining whether evidence of crimes, wrongs or acts other than those specifically at issue is admissible** is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the balancing test of this rule. State v. Shultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987); State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

**Factors to Consider in Determining Admissibility.** — Although no definitive test for the admissibility of photographs alleged to be inflammatory and unduly prejudicial has been developed, factors that courts have looked to in the past include: (1) the number of the photographs; (2) whether the photographs were unnecessarily duplicative of other testimony; (3) whether the purpose of the photographs was aimed solely at arousing the passions of the jury; and (4) the circumstances surrounding the presentation of the photographs. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

**Evidence of decedent's mental condition** over a year before the critical time was admissible, and was not too remote. Caudill v. Smith, 117 N.C. App. 64, 450 S.E.2d 8 (1994).

**Evidence of Intent.** — Evidence of robbery of a restaurant committed by defendants one week prior to the attempted robbery in case at issue was sufficiently similar to show intent. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

The fact that victim had in his possession videotapes which depicted violent homosexual acts had little tendency to show that the victim was the aggressor with intent to sodomize the defendant. State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

**Discretion of Trial Judge.** —

Whether evidence should be excluded under this Rule is ordinarily a decision within the trial court's discretion. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

**Clearly False Statement.** — The admission of a statement that is so clearly false and that is made by a witness who is unavailable to testify or be cross-examined would be misleading to a jury. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

**Applied** in State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992); State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992); State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993); State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Morgan, 111 N.C. App. 662, 432 S.E.2d 877 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994); State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994); State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995).

**Quoted** in State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994); State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

**Cited** in State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992); State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, — U.S. —, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, — U.S. —, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994); State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993); State v. Matheson, 110 N.C. App. 577, 430 S.E.2d 429 (1993); Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778 (1993); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); Robertson v. Nelson, 116 N.C. App. 324, 447 S.E.2d 488 (1994); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994); Richardson v. Patterson, 116 N.C. App. 661, 448 S.E.2d 861 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

## II. PHOTOGRAPHS AND VIDEOTAPES.

**Photographs Held Relevant.** — Color autopsy photographs, although gruesome, were relevant to illustrate the testimony of the pathologist and were illustrative of testimony regarding the number and nature of the victim's wounds and were therefore admissible. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, — U.S. —, 114 S. Ct. 2770, 129 L. Ed. 2d 883 (1994).

Photographs which showed numerous gunshot wounds were relevant to show not only the cause of death, but were also relevant as a means of proving the premeditation and deliberation elements of first-degree murder. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

**Photographs Held Not Excessive** — Photographs of the murder victim, including one illustrating the visible wounds on the decedent's body, were not excessive. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Photographs Held Properly Admitted.** —

Defendant failed to show that the trial court abused its discretion in denying his motion to exclude gun and photograph of gun from evidence. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Where photographs of a homicide victim's body were not excessive in number and were used solely for the purpose of illustrating a medical examiner's testimony, the trial court did not err in admitting them into evidence. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Photograph of rape victim was properly admitted for the limited purpose of illustrating witness medical examiner's testimony as to cause of death. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993).

There was no abuse of discretion in the admission of photographs where each photograph related to material events and facts to which each identifying witness was testifying and further, the testimony of each witness whose testimony the photographs illustrated related to different aspects of the case and served different purposes. State v. Gray, 337 N.C. 772, 448 S.E.2d 794 (1994).

Photographs of defendants' home were properly admitted for the purpose of illustrating four witnesses' testimony. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, cert. granted, 338 N.C. 669, 453 S.E.2d 180 (1994).

Photographs which depicted the victim's fatal wound may have been prejudicial to the defendant, but they were not unfairly so. They were not excessive in number, repetitious or peculiarly gruesome, were properly used to illustrate the testimony of deputy sheriff, and as such, their admission by the trial court did not amount to an abuse of discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

**Conduct of Defendant on Videotape.** —

Condensed videotape which included footage of a body being turned over, placed in a body bag and on a stretcher, then transported to elevator for removal was relevant to illustrate the crime scene prior to the arrival of medical personnel and was neither excessive nor cumulative evidence. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

## III. PREJUDICIAL EVIDENCE, EVIDENCE EXCLUDED BASED ON CONFUSION, ETC.

**Evidence Improperly Admitted.** —

The probative value of defendant's convictions in 1986 was substantially outweighed by the potential for prejudice; and the convictions should have been excluded under this rule upon defendant's motion in limine and his objection at trial. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

**Evidence Properly Excluded.** —

Because the document was remote in time, failed to specify to whom the document was referring, and failed to show a definite susceptibility of propounder to influence testatrix, its probative value was substantially outweighed by its danger of prejudice, and the trial court properly exercised its discretion in excluding the evidence. In re Will of Prince, 109 N.C. App. 58, 425 S.E.2d 711 (1993).

Where officer saw two small bottles of liquor in a purse but had no reason to believe that alcohol consumption contributed to car accident, the probative value of this evidence was outweighed by its prejudicial potential. Browning v. Carolina Power & Light Co., 114 N.C. App. 229, 441 S.E.2d 607, cert. granted, 337 N.C. 800, 449 S.E.2d 566 (1994).

**Evidence Held Prejudicial.** —

Where counsel for the defendant asked over 60 questions referencing an action arising out of events occurring some 12 to 14 years earlier and these inquiries related to an extremely remote event, they were minimally probative when compared to their prejudicial effect, and were therefore proscribed by this rule; further, the continued repetitive questioning reflected the harassment and "needless consumption of time" that Rule 611(a) prohibits. Weston v. Daniels, 114 N.C. App. 418, 442 S.E.2d 69 (1994), cert. denied, 336 N.C. 785, 447 S.E.2d 433 (1994).

Where the probative value of witness's testimony to prove intent, common scheme, plan, modus operandi, or absence of mistake directly depended on defendant having committed the crime about which she testified, defendant's acquittal of the offense in an earlier trial so divested the evidence of probative value that, as a matter of law, it could not outweigh the tendency of such evidence to unfairly prejudice the defendant. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

Interjecting evidence which would allow the jury to infer the defendant's immaturity so that the jury could infer that he lacked capacity to form the requisite intent would have unnecessarily confused the issues; therefore, even if this evidence was relevant and admissible, its exclusion was within the trial court's discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

## IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.

**Cumulative Character Evidence. —**

Where the trial court, by sustaining the prosecutor's objection to a question, did nothing more than exclude cumulative evidence, the trial court's action did not constitute error. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

**Admission of Improper Evidence Not Prejudicial. —**

In view of the entire body and weight of relevant evidence presented by the State against defendant, and the utter irrelevance of a prior sex act to the charges on which defendant was ultimately convicted, the erroneous admission of a statement concerning the sex act did not constitute prejudicial error. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 353 (1993).

**Evidence Properly Admitted. —**

Tape recorded statements regarding defendant's prior crimes including a statement from defendant's own mouth that he had killed various people by sundry methods of his own volition in the past were sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in this rule. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992).

In capital murder trial, trial court did not err by permitting the jury to listen to an audio tape recording of the defendant's telephone conversation with county sheriff because the tape recording was extremely probative. During the conversation, the defendant discussed problems he had experienced with his stepson, whom he shot, the defendant admitted the shooting of his stepson and the "other fellow" and stated that he told the "other guy" that he would "blow (them) away" if "the law comes out here." State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Trial court's admission of the testimony of kidnapping victim regarding a prior incident during which defendant struck the murder victim in the back of the head with a pole and threatened to cut her throat with a butcher knife was upheld. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

No error in the trial judge's discretionary ruling allowing the introduction of a note indicating that the victim was scared of defendant because he had threatened to kill her with a gun earlier that evening into evidence at defendant's first-degree murder trial. State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993).

The trial court did not err in admitting evidence that defendant had previously sexually assaulted another daughter pursuant to Rule 404(b) and this rule. State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994).

Court did not err in allowing testimony concerning defendant's threats to the state's principal witness, these threats were a strong indication of defendant's awareness of his own guilt. State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994).

Where, during her account of how she was sexually assaulted, the victim testified that defendant put his hand over her mouth and told her that if she told anybody what he was going to do he was going to "hurt her like he hurt Koda", the trial court did not err in allowing defendant's statement. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

There was no error where the defendant was required to place over his head a stocking recovered from co-defendant's car because the demonstration was relevant to aid the jury in assessing the credibility of the store clerk's identification of defendant. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

In a murder prosecution, evidence of a prior murder was properly admitted by the trial court to show identity, plan, and the existence of a common modus operandi between the two murders. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

Chain-of-events evidence leading up to murder was properly admitted to establish defendant's intent and motive for the murders at issue, the evidence was more probative than prejudicial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994).

In a prosecution for murder, testimony that a witness saw defendant dancing with the victim and that the witness called the police was relevant and properly admitted as evidence of defendant's character. Also, evidence that witness called the police because he recognized defendant only after seeing on television that defendant had been charged with another murder was not irrelevant, inflammatory, or improperly prejudicial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

## Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* — Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* — Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* — Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult. (1983, c. 701, s. 1; 1994, Ex. Sess., c. 7, s. 3; 1995, c. 509, s. 7.)

**Effect of Amendments.** — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to trials begun on or after that date, added the last sentence of subsection (b).

The 1995 amendment, effective July 29, 1995, substituted "B1, B2" for "B" in subsection (b).

**Legal Periodicals.** —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For note, "The Admissibility of Prior Acquittal Evidence — Has North Carolina Adopted the 'Minority View'? — The Effect of State v. Scott," see 16 Campbell L. Rev. 231 (1994).

For article, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence", see 21 N.C. Cent. L.J. 1 (1995).

## CASE NOTES

I. General Consideration.
II. Character Evidence Generally.
III. Other Crimes and Wrongs.
IV. Illustrative Cases.

### I. GENERAL CONSIDERATION.

**This rule addresses the admissibility of evidence;** it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994).

**It was error for a trial judge not to conduct a voir dire** in order to rule on questions of admissibility and order a tape recording to be edited or redacted as necessary. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 353 (1993).

**Evidence of Victim's State of Mind.** — Evidence that the victim was peaceful and unarmed the night of the murder was relevant to prove that the victim did not provoke defendant and that the murder was committed with premeditation and deliberation. State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995).

**Evidence of Accused's State of Mind.** — In prosecution for assault with a deadly weapon, testimony about defendant's conduct prior to confrontation with deputies and admission of videotape allegedly depicting this conduct would be upheld, as part of the "chain of events" and as showing defendant's state of mind immediately prior to the deputies being called to the scene. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

**Premeditation and deliberation are generally not susceptible of direct proof,** but are mental processes which may be inferred from circumstantial evidence surrounding a murder, including lack of provocation on the part of the victim. State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995).

**Applied** in State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993); State v. Morgan, 111 N.C. App. 662, 432 S.E.2d 877 (1993); State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778 (1993); State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994).

**Quoted** in State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993).

**Cited** in State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Davis, 110 N.C. App. 272, 429 S.E.2d 403 (1993); State v. Matheson, 110 N.C. App. 577, 430 S.E.2d 429 (1993); State v. Harris, 111 N.C. App. 445, 432 S.E.2d 415 (1993); State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995).

### II. CHARACTER EVIDENCE GENERALLY.

**When Evidence of Character Traits Is Admissible.** —

Evidence of criminal activity not related to the crime charged must be relevant to some issue in the case to be admissible; such evidence is inadmissible when introduced to prove defendant's "character in order to show that he acted in conformity therewith." State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

**Military Record or Military Service.** — A good military record or military service is not relevant to defendant's guilt or innocence in a rape case. State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906, cert. denied, 336 N.C. 613, 447 S.E.2d 409 (1994).

**Witness' Beliefs About Defendant Not Evidence of Pertinent Trait.** —

Defense question to rape defendant's employment supervisor of whether he believed defendant was capable of raping anyone was not allowed as evidence of a pertinent character trait under subdivision (a)(1) of this rule. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

**Evidence Showed More than Character.** — In a first-degree murder case, evidence of defendant's having been charged with driving while impaired explained circumstances under which he was taken into custody, and evidence of defendant's refusal to take a breathalyzer test explained the circumstances under which defendant was kept waiting in the Virginia Public Safety Center where he confessed to the crimes for which he was on trial; all of this evidence tended ultimately to show the circumstances under which that confession was made and was thus relevant on the issues of the confession's voluntariness and credibility. The evidence cast more light on these important questions than it did on defendant's character; therefore, its probative value outweighed its prejudicial effect. State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

**Admission of Evidence Prejudicial Error.** — There was no relevancy for the admission of defendant's past violent behavior toward his wife to prove the character of the defendant in relation to motive, opportunity, or intent and the admission of the evidence constituted prejudicial error requiring a new trial. State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1994).

**Admission of Evidence Not Prejudicial.** — The trial court erred in admitting officer's testimony as a drug dealer; however, as defendant's testimony alone was enough from which a reasonable juror could conclude that defendant possessed the marijuana and cocaine with the intent to sell and deliver, defendant was not prejudiced by the admission of the character evidence against him. State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995).

## III. OTHER CRIMES AND WRONGS.

**The list of purposes in the second sentence of subsection (b)** of this rule is neither exclusive nor exhaustive. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

**A prior act or crime is "similar" if** there are some unusual facts present indicating that the same person committed both the earlier offense and the present one. However, the similarities between the two incidents need not be "unique and bizarre." State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

**This rule includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence exclusively.** State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

**Chain-of-events evidence leading up to murder** was properly admitted to establish defendant's intent and motive for the murders at issue, the evidence was more probative than prejudicial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994).

**Sufficiently Similar Crimes.** — Evidence of robbery of a restaurant committed by defendants one week prior to the attempted robbery in case at issue was sufficiently similar to show intent. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

**Prior Acts Showing Motive or Conduct.** —

Trial court's admission of the testimony of kidnapping victim regarding a prior incident during which defendant struck the murder victim in the back of the head with a pole and threatened to cut her throat with a butcher knife was upheld under section (b) of this Rule and under § 8C-1, Rule 403. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Evidence about drug sales by defendant and his friends on the night of the murder was relevant to show the motive for the shooting and to put the crime in context. Thus, the testimony was admissible under section (b) and the trial court did not err in admitting it. State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993).

**Where the prior crime was not being offered to show common plan or scheme, but to show identity,** the passage of time affected the weight of the evidence rather than its admissibility. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994).

**Evidence of prior sex acts, etc.** —

North Carolina liberally admits evidence of prior similar sex offenses; this is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged. State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

The trial court did not err in admitting evidence that defendant had previously sexually assaulted another daughter pursuant to Rule 403 and subsection (b) of this rule. State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994).

**By attacking the victim's character for marital fidelity,** defendant went beyond what was necessary for his defense and opened the door to the rebuttal evidence. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994).

In a prosecution for first-degree murder, first-degree rape, and first-degree sexual assault, evidence of defendant's sexual relations with his ex-wife were probative of defendant's state of mind at the time the victim was sexually assaulted and murdered, and was properly admitted. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

The similarity between two crimes, closely connected temporally, clearly supported the admission of a previous rape to prove identity and intent in the attempted rape for which defendant was being tried. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994).

**Conversation Regarding Advantages of Committing Armed Robbery.** — Evidence of defendant's alleged conversation with witness in which defendant, among other things, discussed the advantages of committing armed robbery over stealing and selling property as well as the manner in which it could be done, constituted Rule 404(b) evidence of another "crime, wrong, or act" on the part of defendant, but was admissible, inter alia, to show defendant had a plan, scheme, system, or design involving the commission of robberies. State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992).

**Evidence of Other Crimes, etc., Is Not Admissible to Prove Character.** —

Evidence of a violent disposition to prove that a person was the aggressor in an affray is an impermissible use of evidence of other crimes and not admissible under subsection (b), but even assuming that these acts were relevant and admissible, the probative value is far outweighed by the prejudicial effect of their admissibility and their admission and that they would only serve to show to the jury that the deceased was somewhat less worthy of living than someone who hadn't performed these relevant acts. State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994).

**Evidence Held Improper But Not Prejudicial.** —

Testimony regarding defendant's failure to spend time with his sons did not tend to show that the victim was afraid of defendant or that she had no intention of reconciling with him. Rather, the evidence tended to show defendant's bad character and, as such, should not have been admitted. In light of all the evidence that was properly introduced, however, this tangential bit of evidence could not have affected the outcome of the trial; therefore, it was not prejudicial error. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

**Inadmissible Evidence Admitted but Held Harmless Error.** — Although testimony was not relevant to any issue except the defendant's character to show that he had a propensity for bad acts and acted in conformity therewith in killing victim, it was harmless error to admit this testimony. In light of the strong substantive evidence against the defendant, as well as other evidence of bad acts including the ingestion of illegal drugs, the result would not have been different had this testimony been excluded. State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

## IV. ILLUSTRATIVE CASES.

**Evidence Held Admissible.** —

Testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to, his wife were admissible under subsection (b) of this rule to prove issues defendant disputed in a trial for her murder, namely, lack of accident, intent, malice, premeditation and deliberation—notwithstanding that some of the incidents dated back to the beginning of the marriage. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, — U.S. —, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, — U.S. —, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Where defendant was tried for the first-degree murder of her husband, evidence of her affair with a co-conspirator was highly probative of her motive for wanting her husband murdered, and evidence of the defendant's theft of money and credit cards, coupled with evidence of her drug problems, tended to show that the defendant needed money which she stood to gain from the insurance proceeds due upon her husband's death; therefore, the trial court did not err in admitting the evidence. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Where a statement regarding a prior sex act, rather than pertaining exclusively to defendant's character, was relevant to lend credibility to the State's confession, the evidence was admissible under section (b) of this rule. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992).

Where the State's evidence showed that in both 1967 and in 1990 defendant gained the trust of his victims, lured them into an automobile and then took them to a different location where they were sexually assaulted, the similarities justified admitting the evidence of prior crimes to prove modus operandi and intent; furthermore, since the 1967 rape was also admissible on the question of consent, it was not so remote as to have lost its probative value. State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

Where defendant had poisoned two other men with arsenic, given the similarities between the crime charged and the other crimes presented by the State, the evidence of the other offenses was relevant as evidence tending to prove modus operandi, motive, opportunity, intent and identity of defendant as the perpetrator. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Evidence that one month prior to the alleged rape, defendant failed to return the victim's car, stole some money, broke into her home, and was arrested was admissible as a part of the history of the event which served to enhance the natural development of the facts. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Testimony regarding prior conviction was admissible under subsection (b) and was not precluded under Rule 609; therefore, the trial court did not err in admitting it and there was no plain error. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994).

Where evidence of defendant's prior assault on the victim tended to show malice, the evidence was thus relevant to an issue other than defendant's character and was properly admitted. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

In a prosecution for first-degree murder, first-degree rape, and first-degree sexual assault, evidence of an attack on a prior victim was properly admitted. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

Testimony was allowed to show that defendant had a metal pipe in his bedroom approximately one month prior to the death of the victim since the evidence tended to show that the victim was killed by the use of a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

In a prosecution for murder, testimony that a witness saw defendant dancing with the victim and that the witness called the police was relevant and properly admitted as evidence of defendant's character. Also, evidence that witness called the police because he recognized defendant as being with the victim only after seeing on television that defendant had been charged with another murder was not irrelevant, inflammatory, and improperly prejudicial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

In a murder prosecution, evidence of a prior murder was properly admitted by the trial court to show identity, plan, and the existence of a common modus operandi between the two murders. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

**Evidence Held Inadmissible. —**

Evidence that thirteen and one-half years prior to trial defendant had been convicted of armed robbery was admissible where the evidence presented by the State of the earlier armed robbery was sufficiently similar to the crimes charged to be admitted for the purpose of showing a modus operandi, motive and even identity, and where the evidence was not too remote in time to be probative of any fact at issue. State v. Wilson, 106 N.C. App. 342, 416 S.E.2d 603 (1992).

Trial judge did not err by allowing testimony about defendant's drug dealings; the disputed evidence was relevant to show defendant's motive for murder.

State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

The trial court erred in allowing cross-examination of defendant about details of his prior convictions in that it bore no logical relevance to the crimes charged that would render it admissible under section (b), and it was not admissible to refute any inaccurate or misleading testimony or inferences raised by defendant. State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

Where defendant was convicted of second degree murder, evidence that defendant had previously shot over a truck was irrelevant and inadmissible and could not be deemed harmless error so that defendant was entitled to a new trial. State v. Irby, 113 N.C. App. 427, 439 S.E.2d 226 (1994).

Court properly excluded from evidence the fact that the victim had twice been convicted of murder. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

# Rule 405. Methods of proving character.

## CASE NOTES

**Expert Opinion on Credibility.** — While it is true that in North Carolina expert testimony on the credibility of a witness is inadmissible, the defendant must show prejudicial error. State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

**Admission of Expert Opinion, Although Error, Not Prejudicial.** — In trial of defendant accused of his wife's murder, trial court erred, under section (a) of this rule, in admitting expert psychiatrist's opinion that victim was not homicidal; however, defendant did not show that this amounted to prejudicial error under § 15A-1443(a). State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

**Applied** in State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992).

**Stated** in Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**Cited** in State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (1994); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

# Rule 406. Habit; routine practice.

## CASE NOTES

**Court to Make Inquiries.** — This rule permits proof of habit by evidence of specific instances of conduct; before evidence of specific instances of conduct may be admitted to prove habit, however, the trial court must make certain inquiries to determine the reliability and probative value of the proffered evidence. Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993), cert. denied, 335 N.C. 553, 441 S.E.2d 113 (1994).

**Testimony Held Admissible.** — It was not error to allow the decedent's sister to testify that she was familiar with the decedent's habit of keeping money and always having on her person from twenty to forty dollars. State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993).

Trial court did not err in admitting testimony relating to plaintiff's prior course of conduct involving alcohol, marijuana, and automobiles where the habit evidence was not admitted to prove that plaintiff was drinking on the night in question, but that plaintiff had a habit of engaging in the above-described behavior, and that his conduct on the night in question was willful or wanton, in conformity with the habit. Anderson v. Austin, 115 N.C. App. 134, 443 S.E.2d 737, cert. denied, 338 N.C. 514, 452 S.E.2d 806 (1994).

## Rule 407. Subsequent remedial measures.

### CASE NOTES

**Applied** in Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993).

## Rule 408. Compromise and offers to compromise.

**Legal Periodicals.** — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

### CASE NOTES

**Applied** in State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992).

## Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

**Legal Periodicals.** —
For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

### CASE NOTES

I. General Consideration.

#### I. GENERAL CONSIDERATION.

**By this statute, the legislature intended to exclude** from evidence only the actual sexual history of the complainant and not prior false accusations made by the complainant. State v. McCarroll, 109 N.C. App. 574, 428 S.E.2d 229, cert. granted, 333 N.C. 794, 430 S.E.2d 426 (1993), rev'd on other grounds, 336 N.C. 559, 445 S.E.2d 18 (1994).

**Deceased Rape Victim.** — In the limited circumstance where the rape victim is deceased and the defendant's own testimony brings into question the victim's sexual behavior, the prosecution may present rebuttal evidence relating to the victim's prior sexual conduct to challenge the credibility of defendant's testimony. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994).

**Cross-Examination of Defendant Concerning Defendant's In Camera Statements.** — Contrary to defendant's position, this rule could not be utilized as a barrier to prevent cross-examination concerning critical inconsistencies in sworn testimony; therefore, the prosecution was properly permitted to cross-examine defendant concerning his prior inconsistent statements made at an in camera hearing. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

**Exclusion of Evidence Upheld.** — Evidence that someone other than defendant sexually abused child two and a half years before the incident resulting in a rape charge against defendant was properly excluded as being irrelevant and confusing to the jury. State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415, appeal dismissed, 332 N.C. 669, 424 S.E.2d 413 (1992).

**Exclusion of Evidence Held Error.** —

Defendant's evidence, which consisted of a letter written by victim to her friend asking her to engage in sex, was evidence of conversation, not of a prior sexual act. Therefore, testimony in sexual abuse case concerning the letter was not deemed irrelevant by this rule and was improperly excluded on that basis. State v. Guthrie, 110 N.C. App. 91, 428

S.E.2d 853, cert. denied, 333 N.C. 793, 431 S.E.2d 28 (1993).

It was error to exclude testimony which would have tended to show that the prosecuting witness was not truthful when she said she had a sexual encounter with someone other than the defendants. State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994).

**Defendant could present evidence of previous acts of bondage between the complainant and defendant,** sexual acts on a leather couch, complainant experiencing pain during previous acts of intercourse, a sexual act on a piano stool, and watching pornographic movies because it was evidence of sexual act pertinent to the defense that the complainant consented to the sexual act that was the basis of the charge. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

**Applied** in State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906, cert. denied, 336 N.C. 613, 447 S.E.2d 409 (1994); State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

**Quoted** in State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993).

## ARTICLE 6.

## *Witnesses.*

## Rule 601. General rule of competency; disqualification of witness.

### CASE NOTES

I. General Consideration.

### I. GENERAL CONSIDERATION.

**The test of competency, etc. —** Subsection (b) of this rule does not ask how bright, how young, or how old a witness is. Instead, the question is: does the witness have the capacity to understand the difference between telling the truth and lying? State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

**Competency of Child to Testify. —** Trial court did not abuse its discretion in finding the four year old victim competent to testify and allowing her to testify to sexual offenses allegedly occurring when she was two. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

Although child was two-and-a-half years at the time of her mother's murder she had the capacity to testify at age five. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994).

It was not error to allow five year old child to testify to the jury while sitting on her stepmother's lap. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994).

**"Unavailable" Witness. —** Where four year old victim's testimony was so limited and she was neither cooperative nor responsive, the victim was in fact "unavailable" for purposes of testifying at trial, and combining her de facto unavailability with the evidentiary importance of her previous statements, the hearsay testimony of the witness to these statements was "necessary" under the two-part hearsay test. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

**Despite child prosecutrix's lack of understanding of an obligation to tell the truth from a religious point of view,** because she stated on direct examination an understanding of the difference between truth and lies and the importance of telling the truth, she exhibited a capacity to understand and relate facts and a comprehension of the difference between the truth and untruth. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

**Applied** in Almond v. Rhyne, 108 N.C. App. 605, 424 S.E.2d 231 (1993).

**Cited** in State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); Caudill v. Smith, 117 N.C. App. 64, 450 S.E.2d 8 (1994).

## Rule 602. Lack of personal knowledge.

### CASE NOTES

**Testimony Establishing Personal Knowledge. —**

Testimony properly allowed to draw an inference that defendant could not have known the caliber of the murder weapon at the time he made his inculpatory statement unless he was the murderer. State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994).

**Testimony Held Improper. —**

Officer's testimony that it appeared just by looking over there that there had indeed been a break in at victim's home on the night in question constituted inadmissible opinion evidence. However, defendant was not entitled to a new trial unless the erroneous admission of this testimony prejudiced him. State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262, cert. denied, 333 N.C. 170, 424 S.E.2d 914 (1992).

**Applied** in State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

**Stated** in State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993).

**Cited** in State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995).

## Rule 603. Oath or affirmation.

### CASE NOTES

**Inquiry into Sincerity of Oath. —** Despite the prohibition of evidence of the beliefs or opinions of a witness on matters of religion, by questioning the sincerity and solemnity with which the witness took the oath, the defense exposed the witness to the same inquiry by the prosecution; thus, and there was no error in the prosecution's questioning of the witness because the defense had already "opened the door" to this line of inquiry. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**Cited** in State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993).

## Rule 606. Competency of juror as witness.

### CASE NOTES

**Information allegedly received by jurors did not concern either the defendant or the case being tried,** but was rather information about the foreman's belief or impression about the impact of punitive damage awards; therefore, the trial court correctly refused to consider the juror affidavits under section (b). Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

**Admissibility of Jurors' Affidavits.** — Subsection (b) reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to extraneous influences that may have affected the jury's decision. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994).

**Applied** in Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992).

**Cited** in Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

## Rule 607. Who may impeach.

### CASE NOTES

**Defendant cannot call witness and then attempt to impeach him** by inquiring into prior charges or indictments against the witness. State v. Mills, 332 N.C. 392, 420 S.E.2d 114 (1992).

**Questions to Rebuttal Witness. —**

Impeaching questions about a previous alleged knifing incident asked by prosecutor of rebuttal witness held not to constitute error. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

**Cited** in State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994).

## Rule 608. Evidence of character and conduct of witness.

**Legal Periodicals. —**

For essay, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale," see 1993 Duke L.J. 776.

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

### CASE NOTES

I. General Consideration.
II. Opinion and Reputation Evidence of Character.
III. Specific Instances of Conduct.

### I. GENERAL CONSIDERATION.

**But State allowed questions about defendant's "Affidavit of Indigency". —** Limited nature of questions permitted by the trial court in allowing the State to cross-examine the defendant regarding the contents of his "Affidavit of Indigency," filed in conjunction with his motion that counsel be appointed for trial, fell within the parameters of subsection (b). State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Applied** in State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994).

**Quoted** in State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1994).

**Stated** in State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**Cited** in State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

### II. OPINION AND REPUTATION EVIDENCE OF CHARACTER.

**Expert Opinion on Credibility. —** In child sexual abuse case where the medical evidence was in conflict, testimony by doctor that was offered to show that the victim was being truthful about allegations was prejudicial. For this reason defendant was entitled to a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

### III. SPECIFIC INSTANCES OF CONDUCT.

**Cross-Examination Held Proper. —** Defendant, on trial for the murder of his wife, opened the door to the cross-examination regarding specific instances of misconduct toward both his wife and children where defendant testified on direct examination that he was a loving and supportive husband and father, that he did not intend to hurt his wife but rather unintentionally, or in self-defense, struck back at her with the screwdriver, trying only to get her to stop moving the car. The state was entitled to cross-examine defendant concerning the specific acts of prior misconduct—including threats, arguments, and acts of violence toward both his wife and children—to explain and rebut defendant's direct examination testimony. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, — U.S. —, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, — U.S. —, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Subsection (b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking his credibility, but such testimony was relevant where the state was not attempting to impeach either witnesses' general reputations for veracity but was trying to rebut their testimony on direct examinations. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

**Evidence Held Inadmissible. —** The trial court erred by allowing the teacher of an alleged victim of sexual abuse to testify on direct examination regarding specific instances of the alleged victim's conduct which tended to establish her truthfulness. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

Instances of alleged prior and unrelated acts of larceny and possession of marijuana, without more, were not necessarily probative of a prosecution witness's propensity for truthfulness or untruthfulness under the standard imposed by subsection (b). State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

Evidence of defendant's prior use of cocaine and marijuana was irrelevant and inadmissible under subsection (b), and under § 8C-1, Rule 611(b), because defendant was not a key prosecution witness. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (1995).

**Exclusion of Evidence Not Prejudicial Error.** — Defendant's intended question to state's witness, concerning an attempt by that witness to lure his acquaintance away from his home so his accomplices could break into the residence and steal the property inside, should have been allowed as bearing on the witness' propensity to deceive and defraud others, but the exclusion of this testimony did not constitute prejudicial error. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

# Rule 609. Impeachment by evidence of conviction of crime.

**Legal Periodicals.** —

For essay, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale," see 1993 Duke L.J. 776.

## CASE NOTES

**The State is prohibited from eliciting details of prior convictions other than** the name of the crime and the time, place, and punishment for impeachment purposes under section (a) of this Rule in the guilt-innocence phase of a criminal trial (overruling State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 and State v. Gibson, 333 N.C. 29, 47-48, 424 S.E.2d 95, 105 (1992)). State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

**Defendant's argument that a prayer for judgment continued** was not a final judgment and should not be treated as a conviction for purposes of this rule was without merit. State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994).

**Scope of Inquiry into Prior Convictions.** —

The prosecution's repeated inquiries into the facts of prior crimes improperly exceeded the limitations on admissibility of evidence of prior convictions for impeachment purposes under section (a) of this Rule established in State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977). State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

**Testimony regarding prior conviction was admissible** under this Rule 404(b) and was not precluded under this Rule; therefore, the trial court did not err in admitting it and there was no plain error. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994).

**The trial court properly restricted defendant's questioning of state's witness on his prior convictions** for breaking and entering and larceny on the time and place of the convictions and the penalties imposed thereon. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

**Error Not Prejudicial.** —

Where the jury knew when the witness was tried for his crime, the date he was convicted, and the name of the crime that he had been convicted of, and also knew that the witness had received five years' probation for this crime, the actual date on which one count of the crime occurred could not add any impeachment value to the information about the prior conviction and the failure to allow this question was harmless. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994).

**Applied** in State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995).

**Cited** in State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

## Rule 610. Religious beliefs or opinions.

### CASE NOTES

**Cited** in State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

## Rule 611. Mode and order of interrogation and presentation.

**Legal Periodicals.** — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

### CASE NOTES

**Scope of Testimony on Redirect Examination.** — Where witness' testimony on redirect examination went beyond the scope of her testimony during direct and cross-examination but the testimony was relevant and otherwise admissible and after its admission, the trial court provided the defendant an opportunity to recross-examine the witness, the trial court did not abuse its discretion. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

**Control of Court over Mode and Order of Questioning.** —

Where counsel for the defendant asked over 60 questions referencing an action arising out of events occurring some 12 to 14 years earlier and these inquiries related to an extremely remote event, they were minimally probative when compared to their prejudicial effect, and were therefore proscribed by Rule 403. Further, the continued repetitive questioning reflected the harassment and "needless consumption of time" that subsection (a) prohibits. Weston v. Daniels, 114 N.C. App. 418, 442 S.E.2d 69 (1994), cert. denied, 336 N.C. 785, 447 S.E.2d 433 (1994).

**Harrassment of Witness.** — Where expert witness was insulted, maligned, continually interrupted and bullied, though she weathered it all with considerable fortitude, the net result may still have been a less than complete, or less than accurate, statement of her opinion; thus, the court could not conclude that the prosecutor's improper conduct toward this witness caused no prejudice to defendant. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

**But evidence of defendant's prior use of cocaine and marijuana was irrelevant and inadmissible** under § C-1, Rule 608(b), and under Rule subsection (b) of this rule, because defendant was not a key prosecution witness. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870 (1995).

**Misconstruction of Answers by Questioner.** — The questioner may not distort the witness' testimony by purposely misconstruing answers and cross-examining the witness on the basis of the misconstruction. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

**No Abuse of Discretion By Judge.** — Where judge did no more than ensure that defense counsel was not consuming the court's time with irrelevant material and, once assured by counsel that the evidence had relevance, the court permitted the questioning to continue without further comment and expressed no opinion on the evidence, the court in no way abused its discretion nor approached the level of interference which would be error. State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994).

**Questions to Rebuttal Witness.** — Impeaching questions about a previous alleged knifing incident asked by prosecutor of rebuttal witness held not to constitute error. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

**Applied** in State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994); State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994); State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

**Quoted** in State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993); State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Stated** in State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

**Cited** in State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267 (1993); State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995).

## Rule 612. Writing or object used to refresh memory.

### CASE NOTES

**Witness Need Not Establish Foundation for Use of Notes.** — Defendant's assertion that this rule requires a witness to establish a foundation for the use of notes to refresh his memory was without merit; this rule stands for nothing other than the requirement that an adverse party is entitled to production of the writing or object which a witness used to refresh his or her memory. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 353 (1993).

**This rule does not provide for the admission into evidence of writings used to refresh a witness' memory,** because the admissibility of these writings is subject to the same rules of admissibility that apply to any evidence. State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994).

**Quoted** in Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

## Rule 614. Calling and interrogation of witnesses by court.

### CASE NOTES

**Clarification of Testimony.** — Questions by judge to expert witness did not denigrate defendant's witness of her evidence, but instead helped to develop testimony favorable to the defense and assist the trial court in its task of deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence. State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994).

## Rule 615. Exclusion of witnesses.

### CASE NOTES

**Applied** in State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

**Cited** in State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

## Article 7.

## *Opinions and Expert Testimony.*

## Rule 701. Opinion testimony by lay witness.

### CASE NOTES

**Shorthand Statements of Fact.** — This exception includes what are frequently called shorthand statements of fact. The comment "he was enjoying what he was doing" represents an instantaneous conclusion of the witness based on his perception of defendant's appearance, facial expressions, mannerisms, etc., and as such, it is a shorthand statement of fact. State v. Eason, 336 N.C. 73, 445 S.E.2d 917 (1994).

**Opinion of the Value of Personal Property.** — A nonexpert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property. Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992), cert. denied, 333 N.C. 345, 426 S.E.2d 707 (1993).

**Capacity of Defendant to Commit Rape.** — "Rape" is a legal term of art and accordingly witness' opinion testimony concerning whether defendant was "capable of rape" was properly excluded. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

**Testimony Upheld.** —

In light of strong and unequivocal evidence of direct threats against a woman, made by the defendant while she was in his presence and he was armed with a firearm, there was no reasonable possibility that admitting the opinion testimony of a security guard, who testified that defendant "said something else to me that indicated to me that he was planning to shoot a woman," affected the result reached by the jury at trial. Therefore, any error in the admission of this testimony was harmless. State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993).

Where the detective expressed a lay opinion that he did not believe the witness's pretrial statement, and this opinion was rationally based on his own firsthand knowledge and observations, this opinion was helpful to explain his earlier testimony and was properly admissible under this rule. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Testimony by son and daughter of pedestrian struck by vehicle that plaintiff was in very poor emotional state, that plaintiff's leg was broken in three different places, that plaintiff looked very uncomfortable and that he was bleeding from his left ear which was the ear he had problems hearing out of were merely giving a factual account of what they observed. Thus, defendant's argument that the statements were opinion was without merit. Bowden v. Bell, 116 N.C. App. 64, 446 S.E.2d 816 (1994).

**Testimony Held Inadmissible.** —

The trial court did not abuse its discretion by refusing to admit testimony where defendant made no showing that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the issue of the distance from which the victim was shot. State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994).

**Applied** in State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

**Stated** in State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993).

**Cited** in State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Dukes, 110 N.C. App. 695, 431 S.E.2d 209 (1993); State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994).

## Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(b) In a medical malpractice action as defined in G.S. 90- 21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
  a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
  b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
  a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
  b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or
(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1983, c. 701, s. 1; 1995, c. 309, s. 1.)

**Effect of Amendments.** — The 1995 amendment, effective January 1, 1996, and applicable to actions filed on or after that date, added the subsection (a) designation, and added subsections (b) through (h).

**Legal Periodicals.** —

For article, "Expert Testimony Regarding the Speed of a Vehicle: The Status of North Carolina Law and the State of the Art," see 16 Campbell L. Rev. 191 (1994).

## CASE NOTES

I. General Consideration.
II. Qualification of Expert.
III. Expert Opinion Not Admissible.
IV. Expert Opinion Admissible.

### I. GENERAL CONSIDERATION.

**Who May Be Experts.** —

For witness' testimony to be admissible as expert testimony, the witness must be qualified by knowledge, skill, experience, training, or education. The expert only needs to be better qualified than the jury as to the subject at hand, with the testimony being "helpful" to the jury. Whether the witness qualifies as an expert is exclusively within the trial judge's discretion, and is not to be reversed on appeal absent a complete lack of evidence to support his ruling. State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

**An opinion based upon reviews of evaluations of doctors who had interviewed defendant** and personal discussions with doctors in whose care defendant had been placed were just as reliable as an opinion based on a hypothetical question. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

**Personal Interview Not Required.** — This rule does not require that an expert personally interview a defendant in order to express an opinion about that defendant's mental condition. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

**Attorney Testimony as to Legal Conclusions.** — Allowing plaintiffs' expert, an attorney, to testify to his individual interpretation of North Carolina law was improper as it amounted to no more than a jury instruction. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

**What Defendant Is Required to Show.** — A defendant is required to make an ex parte threshold showing that the matter subject to expert testimony is likely to be a significant factor in the defense, show that an expert would assist him materially in the preparation of his defense, or show that the denial of expert assistance would deprive him of a fair trial. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

**Applied** in Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d

399 (1993); State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); Griffith ex rel. Griffith v. McCall, 114 N.C. App. 190, 441 S.E.2d 570 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

**Cited** in State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76, cert. denied, 337 N.C. 697, 448 S.E.2d 536 (1994); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994); State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994).

### II. QUALIFICATION OF EXPERT.

**Qualifications of Expert. —** An expert need not have had experience in the very subject at issue. It is enough that through study or experience the expert is better qualified than the fact-finder to render the opinion regarding the particular subject. In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994).

Doctor's lack of clinical experience should not have disqualified him from giving expert opinion testimony. His acknowledged expertise in the field of adolescent sex offenders and his study of articles on treatment of adult sexual offenders made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy, and his testimony, therefore, would have been helpful to the trier of fact. In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994).

### III. EXPERT OPINION NOT ADMISSIBLE.

**Who Was Father in Paternity Action. —** Genetics and paternity testing experts should not have been allowed to express their opinions that defendant was the children's father, because allowing an expert to express an opinion as to who is the father tramples upon the jury's domain. Brooks v. Hayes, 113 N.C. App. 168, 438 S.E.2d 420 (1993).

**Opinion of Abuse by Defendant. —** While doctor's opinion that children were sexually abused was clearly admissible under prior decisions, his opinion that the children were sexually abused by defendant was not. Nonetheless, admission of the evidence was not reversible error. State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

### IV. EXPERT OPINION ADMISSIBLE.

**Expert in Child Sexual Abuse. —** An opinion as "to the age at which the children began to understand dates," by an expert in clinical social work particularly in the area of child sexual abuse, was within the realm of expertise of the witness and was of assistance to the jury; therefore, the trial court did not err by allowing the testimony. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

**Testimony on Chronic Alcohol Abuse. —** Expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue — whether the defendant had premeditated and deliberated; therefore, this expert opinion testimony was not rendered inadmissible on the basis that it embraced the issues of premeditation and deliberation and specific intent to kill, which are ultimate issues to be determined by the jury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

**Cited** in State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

## Rule 703. Bases of opinion testimony by experts.

### CASE NOTES

**Information Commonly Used and Accepted. —** Where expert relied on statistical information commonly used and accepted in his field, such evidence was allowed by this rule. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

**Unless a party specifically objects to the qualification of the expert,** a ruling permitting opinion testimony is tantamount to a finding by the trial court that the witness is qualified to state an opinion. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**An opinion based upon reviews of evaluations of doctors who had interviewed defendant** and personal discussions with doctors in whose care defendant had been placed were just as reliable as an opinion based on a hypothetical question. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994).

**Opinion of Another Physician.** — Where undisputed earlier testimony established that a certain individual was part of a medical group charged with evaluating mental health status and that mental health expert relied upon information from that individual in formulating her final diagnosis, this evidence should have been admitted for the purpose of showing the basis for the expert opinion testimony under this rule. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

**Waiver of Right to Challenge Qualifications on Appeal.** — Where defendant did not object to the qualifications of the witness, but merely objected to the content of the testimony related to specific knowledge of the pellet gun involved in the case, defendant waived the right to challenge the witness's qualification on appeal. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**Genetics Expert.** — Trial court did not err by allowing special agent who was qualified as an expert in molecular genetics to testify that person who analyzed SBI database determined 500 samples to be a representative sample upon which the North Carolina population frequency database was developed, where the special agent was obviously familiar with the analysis of the SBI database and the results. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

**Applied** in State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993).

**Quoted** in State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993).

**Stated** in State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993).

**Cited** in Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

## Rule 704. Opinion on ultimate issue.

### CASE NOTES

**Capacity to Premeditate.** — Expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue — whether the defendant had premeditated and deliberated; such expert opinion testimony was not rendered inadmissible on the basis that it embraced the issues of premeditation and deliberation and specific intent to kill, which are ultimate issued to be determined by the jury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

**Testimony of Attorney as to Legal Conclusions.** — The trial court erred by allowing plaintiffs' expert witness, an attorney, to testify as to legal conclusions where the expert's testimony improperly invaded the trial court's province to determine the legal effect of a purchase money note and the guaranty executed in conjunction therewith, as well as the meaning of certain language in these documents. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

**Defendant's Capacity to Rape.** — "Rape" is a legal term of art and accordingly witness' opinion testimony concerning whether defendant was "capable of rape" was properly excluded. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

**Applied** in State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994).

**Cited** in State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993).

## Rule 705. Disclosure of facts or data underlying expert opinion.

### CASE NOTES

**The probative value of defendant's convictions** in 1986 were substantially outweighed by the danger of unfair prejudice when those convictions were introduced by the state solely to demonstrate the basis of the experts' opinions. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

**Although this rule allows a party to elicit evidence of the underlying facts of a witness' opinion,** it does not restrict a party from asking otherwise proper questions. Therefore, where the district attorney asked the witness in this case whether it would affect his opinion that the defendant would adjust well to prison if he had heard the defendant had attempted to escape from prison in Virginia, it was well within the scope of proper cross-examination. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994).

**Applied** in Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

**Stated** in State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993).

**Cited** in State v. Bronson, 333 N.C. 67, 423 S.E.2d 772 (1992).

## Rule 706. Court appointed experts.

### CASE NOTES

**Fee Upheld.** — Where the referee and the parties signed a consent order appointing an expert witness to appraise the business interest-owned by either or both of the parties and submitted a bill for services in the amount of $32,912, the trial court entered an order finding that the total fee requested was appropriate for the time involved and the types of evaluations which were completed. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, cert. denied, 338 N.C. 669, 453 S.E.2d 181 (1994).

**Cited** in Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993).

## ARTICLE 8.

## *Hearsay.*

## Rule 801. Definitions and exception for admissions of a party-opponent.

### CASE NOTES

**Evidence Not Hearsay.** — When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

**Composite Picture of Perpetrator Not a Statement.** — A composite picture of a perpetrator prepared by police pursuant to the directions of a witness to a crime does not constitute a statement. Such a composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness' eyes rather than the witness' camera. No assertion or statement is involved. Therefore, a composite picture is not hearsay as defined by subsection (c) of this rule and Rule 802, and does not apply to bar the admission of a composite picture into evidence. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

**Corroboration by Videotape.** — Videotape was properly offered and accepted by the court as corroboration of the victim's testimony as the victim's statements were not offered to prove that defendant sexually assaulted the victim, but rather to show that the victim had made a similar, consistent statement to a counselor. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

**Jury's Province To Draw Inferences from Silence.** — A response which is not the equivalent of a denial may indicate acquiescence and be considered by the jury for what it is worth; where the evidence leaves the matter in doubt, it is the jury's province to determine whether the remarks were heard and understood, and to draw inferences from the person's silence. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

**Defendant's comments concerning statements he made to a coworker,** to the extent they were hearsay, fell within the exception to the hearsay rule for admissions by a party opponent. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

**State of Mind Exception.** — Statements made by the victim shortly before the victim's death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk" were admissible, under the state of mind exception to the hearsay rule. State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

**That an admission of defendant was contained within a hearsay statement by another individual** which was admissible as a prior inconsistent statement did not affect its admissibility because both statements were admissible. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**When Acts and Declarations of Co-conspirators Are Admissible.** —

In accord with the main volume. See State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

**Admission of Acts or Declarations of Co-conspirator Before Conspiracy Is Established.** —

While a prima facie showing of the existence of a conspiracy must be established independently of the statements sought to be admitted, the trial court may use such statements in establishing the times when the conspiracy was entered and terminated. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

**Co-conspirator's Statement Properly Admitted.** —

Where there was substantial evidence that the defendant had entered a conspiracy to kill her husband and that a co-conspirator's statements to another co-conspirator were in furtherance of and during the conspiracy, the trial court did not err by admitting testimony of the co-conspirator to whom the statements were made regarding those statements. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, — U.S. —, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

**Statement by Accessory.** — Statement of defendant, convicted of being an accessory before the fact to murder committed by his girlfriend, to the effect that she was the one who brought up the discussions about killing the victims, constituted hearsay under subsection (a); however, this statement was admissible under subsection (d) as a party admission. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

**Evidence Not Hearsay.** —

Statements which were offered not to prove the truth of any matter asserted therein, but rather to explain the subsequent conduct of the defendant and his accomplices in shooting detective and the context in which the murder occurred were not hearsay and were admissible. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

**Evidence Held Admissible.** —

Statements of one person to another are not hearsay if the statement is made to explain the subsequent conduct of the person to whom the statement was made. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

Defendant's statements to victim concerning his crimes against another victim, if relevant, were admissible pursuant to subsection (d) and were relevant because they tended to show that the murder was especially heinous, atrocious, or cruel and tended to show the murder was part of a course of conduct. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994).

**Applied** in State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); Melton v. Hodges, 114 N.C. App. 795, 443 S.E.2d 83 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

**Stated** in State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

**Cited** in State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); Southern Ry. v. Biscoe Supply Co., 114 N.C. App. 474, 442 S.E.2d 127 (1994).

## Rule 802. Hearsay rule.

**Legal Periodicals. —**

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

### CASE NOTES

**Exception to hearsay rule may violate constitutional guarantees of the right of confrontation.** — Even if an out-of-court statement properly falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes upon the defendant's constitutional right to confrontation. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), — U.S. —, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, — U.S. —, 114 S. Ct. 1875, 128 L. Ed. 2d 495 (1994).

**Composite Picture of Perpetrator Not a Statement.** — A composite picture of a perpetrator prepared by police pursuant to the directions of a witness to a crime does not constitute a statement. Such a composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness' eyes rather than the witness' camera. No assertion or statement is involved. Therefore, a composite picture is not hearsay as defined by this rule and Rule 801(c), and does not apply to bar the admission of a composite picture into evidence. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

**Evidence Held Admissible. —**

The father's statement, relayed by the witness, explained why the deputies did not subsequently look for defendant at the father's house and was not offered to prove the truth of the matter asserted, but rather to explain the officers' actions, and was, therefore, not hearsay. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**Applied** in State v. Wilson, 338 N.C. 244, 449 S.E.2d 391 (1994).

**Stated** in State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993).

## Rule 803. Hearsay exceptions; availability of declarant immaterial.

**Legal Periodicals. —**

For note, "Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-'Firmly Rooted' Exception," see 14 Campbell L. Rev. 347 (1993).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

### CASE NOTES

I. General Consideration.
III. Excited Utterances.
IV. Mental, Emotional or Physical Condition.
V. Statements for Diagnosis or Treatment.
VI. Recorded Recollection.
VII. Records of Regularly Conducted Activity.
VIII. Public Records and Reports.
X. Learned Treatises.
XIII. Other Exceptions.

## I. GENERAL CONSIDERATION.

**Applied** in In re Gallinato, 106 N.C. App. 376, 416 S.E.2d 601 (1992); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993); State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

**Stated** in Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993); Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370, cert. denied, 338 N.C. 519, 452 S.E.2d 813 (1994).

**Cited** in Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Oxendine, 112 N.C. App. 731, 436 S.E.2d 906 (1993); State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994); State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (1994); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

## III. EXCITED UTTERANCES.

**Statement Admissible as Excited Utterance. —**

Testimony of witness on voir dire that victim told him that defendant attempted to kill her and that victim wanted to move in with witness provided a plausible reason and factual basis for the victim's fear of defendant, which was relevant to show the nature of the victim's relationship with defendant and the impact of the defendant's behavior on the victim's state of mind prior to the murder. State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993).

**The rationale for the admissibility of an excited utterance is its trustworthiness, etc. —**

The reason for allowing the excited utterances exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

**Child Victim's Statements to Grandmother. —**

Statement to her grandmother by a two-and-a-half year old child that her mother was dead was an excited utterance and was admissible as an exception to the hearsay rule. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994).

**Statement to Aunt an Hour After Event.** — The trial court properly excluded aunt's testimony on the grounds that it was inadmissible hearsay where defendant first talked to his aunt on the telephone after the shooting from his grandmother's house to tell her where he was and that he was on his way home and defendant did not mention the shooting on the phone but waited until after he had ridden home, an hour after the shooting, to tell her what had happened. State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994).

**Child Victim of Sexual Assault. —** Because testimony indicated that statements by a child, allegedly the victim of a sexual assault, were (1) spontaneous and not in response to any questioning on the part of the adult to whom they were made, (2) related to the alleged sexual assault, a "startling event," particularly to a young child, and (3) were made only three days after such assault, the testimony was properly admitted pursuant to subdivision (2) of this rule. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), — U.S. —, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, — U.S. —, 114 S. Ct. 1875, 128 L. Ed. 2d 495 (1994).

## IV. MENTAL, EMOTIONAL OR PHYSICAL CONDITION.

**Statement of Intent to Engage in Future Act, etc. —**

In accord with first paragraph in the main volume. See State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

Subdivision (3) of this rule does not contain a requirement that the declarant's statement must be closely related in time to the future act intended. A review of the cases interpreting subdivision (3) of this rule does not reveal that any such requirement has been read into the statute. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

**Statements in victim's diary were not statements of her state of mind** but were merely a recitation of facts which described various events; thus, the diary entry was not admissible under the state-of-mind hearsay exception. State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994).

**Testimony Held Admissible. —**

Statements made by an alleged victim of a sexual assault during the course of diagnosis by her therapist as a sexually abused child and during her treatment were properly admitted by the trial court under subdivision (4) of this rule. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), — U.S. —, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, — U.S. —, 114 S. Ct. 1875, 128 L. Ed. 2d 495 (1994).

Defendant's statement to his sister that he was going to meet two guys to buy stolen merchandise was admissible under subsection (3) as a statement of his then-existing intent to engage in a future act. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

Statements made by the victim shortly before the victim's death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk" were admissible, under the state of mind exception to the hearsay rule. State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

Statement by a witness testifying as to the events leading up to shooting was properly admitted pursuant to subsection (3), as evidence of the alleged threats made by defendant to explain the victim's then-existing mental and emotional state. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

## V. STATEMENTS FOR DIAGNOSIS OR TREATMENT.

**Subjective record plaintiff kept of her pain** fell under the hearsay exception for statements for purposes of medical diagnosis or treatment under subsection (4) of this rule. Reed v. Abrahamson, 108 N.C. App. 301, 423 S.E.2d 491 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 624 (1993).

**Statements of the defendant's mother and wife** were inadmissible under this rule because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**The testimony of a social worker and coordinator and child evaluator for Child Protection Team** was properly admitted as substantive evidence under Rule 803(4). State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

**Statements Not Admissible. —** Defendant's statements to a psychiatrist who saw defendant less than two months before trial and nine months after the killing, and whose interview with defendant was arranged by defense counsel, were not admissible. State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (1994).

## VI. RECORDED RECOLLECTION.

**Used to Refresh Recollection or Impeachment. —** Where prior statements were used either to refresh the witnesses' recollections, or to impeach portions of his courtroom testimony which were inconsistent with them, use of the statements was proper. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

## VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

**Sales Ticket. —** Sales ticket and testimony concerning the purchase of ammunition from store was admissible under the business records exception. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

**Reservation deposit receipts,** photographic copies of checks written to condominium development corporation by potential purchasers as deposits, and receipts for public offering statements signed by the purchaser and sales person were admissible in trial for embezzlement pursuant to the business records exception to the hearsay rule. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

## VIII. PUBLIC RECORDS AND REPORTS.

**Evidence in a Police Report Properly Admitted. —** Testimony of police officer concerning statements made by decedent at the scene of the accident, made via police officer's investigative report, was admissible pursuant to subdivision (6) as a record of regularly conducted activity and subdivision (8) as a public record and report. Keith v. Polier, 109 N.C. App. 94, 425 S.E.2d 723 (1993).

**Occupational Safety and Health Administration Report. —** Trial court was correct to allow author of Occupational Safety and Health Administration

(OSHA) report to introduce the report and discuss its findings, but not allow him to state the report's conclusion that the accident was caused by brake failure. Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994).

### X. LEARNED TREATISES.

**Learned Treatise Not Shown.** — Article about which the state cross-examined doctor was not established as a learned treatise and thus was not admissible as substantive evidence. State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

### XIII. OTHER EXCEPTIONS.

**Trustworthiness of Child Victim's Out-of-Court Statements, etc.** — In a rape prosecution, child victim's hearsay statements to police officer and counselor were sufficiently trustworthy to be admitted pursuant to residual hearsay exception of subdivision (24) of this rule despite trial judge's lone statement, found in the transcript of the in camera hearing, that the child "did not seem to understand the consequences of not telling the truth." State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415, appeal dismissed, 332 N.C. 669, 424 S.E.2d 413 (1992).

# Rule 804. Hearsay exceptions; declarant unavailable.

**Legal Periodicals.** — For note, "Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-'Firmly Rooted' Exception," see 14 Campbell L. Rev. 347 (1993).

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

## CASE NOTES

I. General Consideration.
II. Unavailability as a Witness.
III. Former Testimony.
V. Statement against Interest.
VI. Other Exceptions.

### I. GENERAL CONSIDERATION.

**Applied** in State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (1994); State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (1994).

**Quoted** in State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

**Cited** in State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415 (1992); State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993); State v. Swindler, 339 N.C. 469, 450 S.E.2d 907 (1994).

### II. UNAVAILABILITY AS A WITNESS.

**Suicidal Tendency of Witness.** — Where the trial judge not only observed the demeanor of the witness, but heard the testimony of the witness's former psychiatrist that the witness suffered from a mental infirmity such that testifying could make her suicidal, the record supported the trial court's determination that the witness was unavailable. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994).

Evidence held to support finding that witness was unavailable so as to allow an admission to the investigating officers. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

### III. FORMER TESTIMONY.

**Even though there exists a preference for face-to-face confrontation at trial** subsection b(1) recognizes an exception to this requirement. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

### V. STATEMENT AGAINST INTEREST.

**Statements Not Found to Be Against Interest. —** Statements made by arrestee to defendant admitting that LSD found in a box underneath the defendant while in arrestee's car belongs to arrestee and not to defendant were not admissible as statements made against arrestee's penal interests under subdivision (b)(3) because it is simply not a crime to know that drugs do not belong to a particular individual. State v. Eggert, 110 N.C. App. 614, 430 S.E.2d 699 (1993).

### VI. OTHER EXCEPTIONS.

**Admission of Evidence Upheld. —** Where witness testified to events about which only she could have known, made statements against her penal interest regarding her use of illegal drugs and participation in prostitution, was incarcerated for much of the time between the interview and the trial, and never attempted to recant her statement which was made to a law enforcement officer, the hearsay testimony possessed sufficient guarantees of trustworthiness to be constitutionally admissible under this rule. State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994).

A victim-declarant's statements to a law enforcement officer describing (i) ill will between the defendant and herself and fear of the defendant and (ii) prior attacks by the defendant and the victim's fear are likely to possess the required guarantees. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

## Rule 806. Attacking and supporting credibility of declarant.

### CASE NOTES

**Quoted** in State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

## ARTICLE 9.

## *Authentication and Identification.*

## Rule 901. Requirement of authentication or identification.

### CASE NOTES

**Authentication of Tape Recording. —**

The trial court erred by excluding a tape recording offered to impeach testimony of coconspirator based on improper foundation, where a witness had sufficient personal knowledge of coconspirator's voice to properly identify her voice from a prior relationship, and the State and defendant stipulated to the date of the tape recording. State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692, cert. denied, 335 N.C. 180, 438 S.E.2d 207 (1993).

**Evidence Held Admissible. —** Where witness testified concerning his familiarity with defendant's handwriting, there was sufficient evidence to support the trial court's admission of handwritten letter into evidence. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

**Applied** in State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993).

**Stated** in State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994).

**Cited** in State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (1993).

## ARTICLE 10.

## *Contents of Writings, Recordings and Photographs.*

# Rule 1002. Requirement of original.

### CASE NOTES

**Best Evidence Rule Not Applicable.** — Where detective was not attempting to prove the contents of the tape recording or the transcript of the recorded statement given by defendant, but used the transcript of the recorded statement to refresh his personal recollection of defendant's responses to the questions asked, the "best evidence" rule did not apply. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

# Chapter 9.

# Jurors.

### Article 1.

### Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-1. Jury commission in each county; membership; selection; oath; terms; expenses of jury system.
9-5. Procedure for drawing panel of jurors; numbers drawn.
9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

### Article 2.

### Petit Jurors.

Sec.
9-12. Supplemental jurors from other counties.

### Article 5.

### Discharge of Jurors Prohibited.

9-32. Discharge of juror unlawful.

## ARTICLE 1.

## *Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.*

### § 9-1. Jury commission in each county; membership; selection; oath; terms; expenses of jury system.

Not later than July 1, 1967, there shall be appointed in each county a jury commission of three members. One member of the commission shall be appointed by the senior regular resident superior court judge, one member by the clerk of superior court, and one member by the board of county commissioners. The appointees shall be qualified voters of the county, and shall serve for terms of two years. Appointees may be reappointed to successive terms. A vacancy in the commission shall be filled in the same manner as the original appointment, for the unexpired term. Each commissioner shall take an oath or affirmation that, without favor or prejudice, he will honestly perform the duties of a member of the jury commission during his term of service. The compensation of commissioners shall be fixed by the board of county commissioners, and shall be paid from the general fund of the county. All expenses necessary to carry out the provisions of this Chapter and to administer the jury system, including all data processing, document processing, supplies, postage, and other similar expenses, except as otherwise provided in this Chapter, shall be paid from the general fund of the county, except that the clerk of superior court shall furnish clerical or other personnel assistance, as the commission may reasonably require. (1967, c. 218, s. 1; 1981, c. 720, s. 3; 1991, c. 729, s. 1.)

#### CASE NOTES

**Deviations from the statutory norm do not automatically constitute reversible error** absent an express statutory provision to the contrary. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

**In order to justify a motion to quash an indictment upon grounds**

**that statutory procedures were violated** in the compilation of the jury list, a party must show corrupt intent, systematic discrimination in the compilation of the list, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

**Compilation of Jury List by Two-Person Commission.** — Defendant failed to present any evidence that the two-person commission which acted when the third commissioner was killed acted with corrupt intent, or that the use of a two-person instead of three-person commission resulted in either systematic discrimination in the compilation of the jury list or irregularities which affected the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

**Cited** in State v. Moore, 100 N.C. App. 217, 395 S.E.2d 434 (1990).

## § 9-2. Preparation of jury list; sources of names.

### CASE NOTES

I. General Consideration.
II. Sources of List.
III. Proof of Discrimination.

#### I. GENERAL CONSIDERATION.

**Deviations from the statutory norm do not automatically constitute reversible error** absent an express statutory provision to the contrary. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

**In order to justify a motion to quash an indictment upon grounds that statutory procedures were violated** in the compilation of the jury list, a party must show corrupt intent, systematic discrimination in the compilation of the list, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

**Cited** in State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988).

#### II. SOURCES OF LIST.

**Compilation of List in 1981.** — Commission was not required to use as a source of names the list of licensed drivers residing in the county, where in accord with subsection (a) of this section, the jury list for the county for the biennium beginning January 1, 1982, was compiled November 23 and 24, 1981, as at that time subsection (c) of this section was not in effect, even though the trial began in October 1983. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

#### III. PROOF OF DISCRIMINATION.

**Sample of 40 Jurors Insufficient.** — A small sample of 40 jurors from the master list of jurors of a county alone was insufficient to establish a systematic exclusion of blacks from the jury pool. State v. McNeill, 326 N.C. 712, 392 S.E.2d 78 (1990).

## § 9-3. Qualifications of prospective jurors.

### CASE NOTES

**Stated** in United States v. McLean, 904 F.2d 216 (4th Cir. 1990).

## § 9-5. Procedure for drawing panel of jurors; numbers drawn.

The board of county commissioners in each county shall provide the clerk of superior court with a jury box, the construction and dimensions of which shall be prescribed by the administrative officer of the courts. At least 30 days prior to January 1 of any year for which a list of prospective jurors has been prepared, a number of discs, squares, counters or markers equal to the number of names on the jury list shall be placed in the jury box. The discs, squares, counters, or markers shall be uniform in size, weight, and appearance, and may be made of any suitable material. They shall be numbered consecutively to correspond with the numbers on the jury list. The jury box shall be of sufficient size to hold the discs, squares, counters or markers so that they may be easily shaken and mixed, and the box shall have a hinged lid through which the discs, squares, counters or markers can be drawn. The lid shall have a lock, the key to which shall be kept by the clerk of superior court.

At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or his assistant or deputy shall, in public, after thoroughly shaking the box, draw therefrom the number of discs, squares, counters, or markers equal to the number of jurors required for the session or sessions scheduled. For each week of a superior court session, the senior resident superior court judge for the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located shall specify the number of jurors to be drawn. For each week of a district court jury session, the chief district judge of the district court district in which the county is located shall specify the number of jurors to be drawn. Pooling of jurors between or among concurrent sessions of various courts is authorized in the discretion of the senior regular resident superior court judge. When pooling is utilized, the senior regular resident superior court judge, after consultation with the chief district judge when a district court jury is required, shall specify the total number of jurors to be drawn for such concurrent sessions. When grand jurors are needed, nine additional numbers shall be drawn.

As the discs, squares, counters, or markers are drawn, they shall be separately stored by the clerk until a new jury list is prepared.

The clerk of superior court shall deliver the list of numbers drawn from the jury box to the register of deeds, who shall match the numbers received with the numbers on the jury list. The register of deeds shall within three days thereafter notify the sheriff to summon for jury duty the persons on the jury list whose numbers are thus matched. The persons so summoned may serve as jurors in either the superior or the district court, or both, for the week for which summoned. Jurors who serve each week shall be discharged at the close of the weekly session or sessions, unless actually engaged in the trial of a case, and then they shall not be discharged until their service in that case is completed. (1806, c. 694, P.R.; 1868-9, c. 9, ss. 5, 6; c. 175; Code, ss. 1726, 1727, 1731; 1889, c. 559; 1897, c. 117; 1901, c. 28, s. 3; c. 636; 1903, c. 11; 1905, c. 38; c. 76, s. 4; c. 285; Rev., ss. 1958, 1959; C.S., ss. 2313, 2314; 1967, c. 218, s. 1; 1969, c. 205, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 38.)

### § 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

(a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

(b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he or any district court judge of his district court district designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedures shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed. In counties located in a district or set of districts as defined in G.S. 7A-41.1(a) which have a trial court administrator, the chief district judge may assign the duty of passing on applications for excuses from jury service to the administrator. In all cases concerning excuses, the clerk of court or the trial court administrator shall notify prospective jurors of the disposition of their excuses.

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a subsequent session of court. If required to serve subsequently, the juror shall be considered on such occasion the same as if he were a member of the panel regularly summoned for jury service at that time.

(d) A judge hearing applications for excuses from jury duty shall excuse any person disqualified under § 9-3.

(e) The judge shall inform the clerk of superior court of persons excused under this section, and the clerk within 10 days shall so notify the register of deeds, who shall note the excuse on the juror's card and file it separately from the jury list.

(f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section. (1967, c. 218, s. 1; 1969, c. 205, ss. 4, 5; 1971, c. 377, s. 30; 1979, 2nd Sess., c. 1207, s. 1; 1981, c. 430, s. 2; 1985, c. 609, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 47.)

## CASE NOTES

**Judges' Power to Excuse Jurors.** — Although subsection (f) of this section provides that superior court judges have the power to excuse jurors, this power must be exercised within the constraints of constitutional requirements. State v. Cole, 331 N.C. 272, 415 S.E.2d 716 (1992).

**Failure to Strictly Comply with Section Not Grounds for New Trial.** — Although it was clear that the district court judge failed to strictly comply with the provisions of this section governing the excusal of jurors, the alleged statutory irregularities did not constitute error; defendant was not entitled to a new trial because the evidence tended to negate any corrupt intent, discrimination or irregularities which affected the action of the jurors actually drawn and summoned. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

**But Compliance with Section Suggested.** — Although the actions of the trial judge did not result in error, the Supreme Court would suggest that district court judges excuse jurors only in keeping with the language and the spirit of this section. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

**Admonishment of Juror.** — It is not improper for a judge to admonish a prospective juror for taking a position solely for the purpose of being excused from jury duty. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

## ARTICLE 2.

## *Petit Jurors.*

### § 9-11. Supplemental jurors; special venire.

CASE NOTES

**Discretion of Judge.** — The section neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

### § 9-12. Supplemental jurors from other counties.

(a) On motion of any party or the State, or on his own motion, any judge of the superior court, if he is of the opinion that it is necessary in order to provide a fair trial in any case, and regardless of whether he will preside over the trial of that case, may order as many jurors as he deems necessary to be summoned from any county or counties in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county of trial is located or in any adjoining district or set of districts. These jurors shall be selected and shall serve in the manner provided for selection and service of supplemental jurors selected from the jury list. These jurors shall be subject to the same challenges as other jurors, except challenges for nonresidence in the county of trial.

(b) Transportation may be furnished in lieu of mileage.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1913, c. 4, ss. 1, 2; C.S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1; 1971, c. 377, s. 32; 1987 (Reg. Sess., 1988), c. 1037, s. 48.)

**Editor's Note.** — This section was amended by Session Laws 1987 (Reg. Sess., 1988), c. 1037, s. 48, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

### § 9-14. Jury sworn; judge decides competency.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

**The presiding judge has the duty to supervise the examination of prospective jurors.** State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994).

**Regulation of the manner and extent of inquiries on voir dire** rests largely in the trial judge's discretion. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994).

## § 9-15. Questioning jurors without challenge; challenges for cause.

### CASE NOTES

I. In General.

### I. IN GENERAL.

**The questioning of jurors in defendant's absence** erroneously deprived defendant of his right to be present at his trial, but the error was harmless where the court was satisfied here beyond a reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

**Applied** in State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

**Quoted** in State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

## § 9-18. Alternate jurors.

### CASE NOTES

**Cited** in State v. Godwin, 95 N.C. App. 565, 383 S.E.2d 234 (1989).

## ARTICLE 3.

## *Peremptory Challenges.*

## § 9-19. Peremptory challenges in civil cases.

### CASE NOTES

**Peremptory Challenges on Basis of Race Prohibited.** — N.C. Const., Art. I, § 26 proscribes peremptory challenges to jurors on the basis of race in civil cases as well as criminal cases. Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988).

**Transcript of Jury Voir Dire Must Be Provided to Reviewing Court.** — As a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire. Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988).

## § 9-20. Civil cases having several defendants; challenges apportioned; discretion of judge.

### CASE NOTES

**No Authority to Allot a Defendant More than Six Challenges.** — Having found that the interests of the defendants were antagonistic, this section authorized the trial judge in his discretion to either apportion between them the eight peremptory challenges allotted to the defendants or to increase the peremptory challenges of each defendant up to a maximum of six; it did not authorize the judge to allot either defendant more than six peremptory challenges.

Shuford v. McIntosh, 104 N.C. App. 201, 408 S.E.2d 747 (1991).

## § 9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

### CASE NOTES

**Cited** in State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

## ARTICLE 5.

## *Discharge of Jurors Prohibited.*

## § 9-32. Discharge of juror unlawful.

(a) No employer may discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

(c) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1987, c. 702, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 702, s. 2 made this Article effective October 1, 1987.

**Legal Periodicals.** — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

# Chapter 10A.

# Notaries.

| Sec. | Sec. |
|---|---|
| 10A-4. Commissioning. | 10A-12. Enforcement and penalties. |
| 10A-6. Recommissioning. | 10A-13. Change of status. |

## § 10A-4. Commissioning.

(a) Except as provided in subsection (c) of this section, the Secretary of State shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age.
(2) Reside or work in this State.
(3) Satisfactorily complete a course of study that is approved by the Secretary of State and consists of not less than three hours nor more than six hours of classroom instruction provided by community colleges throughout the State, unless the person is a licensed member of the Bar of this State.
(4) Purchase and keep as a reference a manual approved by the Secretary of State that describes the duties, authority, and ethical responsibilities of notaries public.
(5) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary of State and be available at the register of deeds office in each county. Every application shall bear the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths. The applicant shall also obtain the recommendation of one publicly elected official in North Carolina whose recommendation shall be contained on the application.

(c) The Secretary of State may deny an application if any of the following applies to the applicant:

(1) The applicant has been convicted of a crime involving dishonesty or moral turpitude.
(2) The applicant has had a notarial commission or professional license revoked, suspended, or restricted by this or any other state.
(3) The applicant has engaged in official misconduct, whether or not disciplinary action resulted.

(d) The course of study required by subsection (b) of this section shall be taught by an instructor certified in accordance with rules adopted by the Secretary of State. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass a six-hour instructor's course taught by the notaries public director or other person approved by the Secretary of State.
(2) Have six months of active experience as a notary public.
(3) Maintain a current commission as a notary public.

(4) Purchase the current notary public guidebook.

Registers of deeds, assistant and deputy registers of deeds, clerks of court, and assistant and deputy clerks of court are exempt from the requirements set forth in subdivisions (2) and (3) of this subsection while they remain actively employed in the capacities named.

(e) Certification to teach a course of study shall be effective for two years and may be renewed by passing a recertification course taught by the notaries public director or other person approved by the Secretary of State. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1; 1983, c. 427, ss. 1, 2; c. 713, s. 22; 1991, c. 683, s. 2; 1995, c. 226, s. 1.)

**Effect of Amendments.** — The 1995 amendment, effective October 1, 1995, and applicable to applications for recommission on or after that date, added subsections (d) and (e).

CASE NOTES

**Cited** in Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

## § 10A-6. Recommissioning.

An applicant for recommissioning as a notary shall submit a new application and comply anew with the provisions of G.S. 10A-4, except that the applicant shall not be required to complete the course of study described in subdivision (b)(3) nor to obtain the recommendation of a publicly elected official. (1991, c. 683, s. 2; 1995, c. 226, s. 2.)

**Effect of Amendments.** — The 1995 amendment, effective October 1, 1995, and applicable to applications for recommission on or after that date, substituted "that the applicant shall not be required to complete the course of study described in subdivision (b)(3) nor to obtain the recommendation of a publicly elected official" for "for subdivision (b)(3)" at the end of the section.

## § 10A-9. Powers and limitations.

**Editor's Note.** — The citations to McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., which appear under this section in the main volume, are incorrect. The correct citation is McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 113, 19 S.E. 109 (1894).

## § 10A-12. Enforcement and penalties.

(a) Any person who holds himself or herself out to the public as a notary or who performs notarial acts and is not commissioned is guilty of a Class 1 misdemeanor.

(b) Any notary who takes an acknowledgment or performs a verification or proof without personal knowledge of the signer's identity or without satisfactory evidence of the signer's identity is guilty of a Class 2 misdemeanor.

(c) Any notary who takes an acknowledgment or performs a verification or proof knowing it is false or fraudulent is guilty of a Class I felony.

(d) Any person who knowingly solicits or coerces a notary to commit official misconduct is guilty of a Class 1 misdemeanor.

(e) For purposes of enforcing this Chapter, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers when executing arrest warrants. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations of this Chapter. (1991, c. 683, s. 2; 1993, c. 539, ss. 6-8, 1121; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 226, s. 4.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, in subsection (a) substituted "Class 1 misdemeanor" for "misdemeanor and is punishable by a fine, imprisonment, or both, in the discretion of the court"; in subsection (b) substituted "Class 2 misdemeanor" for "misdemeanor and is punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed 60 days, or both"; in subsection (c) substituted "I" for "J"; and in subsection (d) substituted "Class 1 misdemeanor" for "misdemeanor and is punishable by a fine, imprisonment, or both, in the discretion of the court".

The 1995 amendment, effective October 1, 1995, and applicable to applications for recommission on or after that date, rewrote the catchline, which formerly read "Penalties", and added subsection (e).

## § 10A-13. Change of status.

(a) Within 30 days after the change of a notary's residence address, the notary shall notify the Secretary of State, by certified or registered mail, and provide a signed notice of the change, giving both the old and new addresses.

(b) Within 30 days after changing names, a notary shall notify the Secretary of State of the change by submitting a new application. The Secretary of State shall cancel the notary's commission under the old name, issue a commission under the new name, direct the notary to reappear before the register of deeds to take the oath of office, and direct the register of deeds to correct The Record of Notaries Public.

(c) A notary who resigns a commission shall deliver to the Secretary of State, by certified or registered mail, a notice indicating the effective date of resignation. Notaries who neither reside nor work in the State shall resign their commission.

(d) The Secretary of State may revoke a notarial commission on any ground for which an application for a commission may be denied under G.S. 10A-4(c). The Secretary of State may revoke the commission of a notary who fails to administer an oath or affirmation when performing a notarial act that requires the administering of an oath or affirmation. (1991, c. 683, s. 2; 1995, c. 226, s. 3.)

**Effect of Amendments.** — The 1995 amendment, effective October 1, 1995, and applicable to applications for recommission on or after that date, added the second sentence in subsection (d).

# Chapter 11.

**Editor's Note.** — The legislation and annotations affecting Chapter 11 have been included in a recently published replacement chapter.

# Chapter 12.

# Statutory Construction.

Sec.
12-3.1. Fees and charges by agencies.

## § 12-3. Rules for construction of statutes.

**Legal Periodicals.** — For article, "'Original Intention': Raoul Berger's Fake Antique," see 70 N.C.L. Rev. 1523 (1992).

### CASE NOTES

- I. General Consideration.
- II. Determination of Intent and Meaning.
  - A. In General.
- III. Similar and Related Acts.
  - B. Statutes in Pari Materia.
- VI. Definitions.

### I. GENERAL CONSIDERATION.

**The statutory inclusion of certain things implies the exclusion of others.** Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

**Quoted** in DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987).

### II. DETERMINATION OF INTENT AND MEANING.

#### A. In General.

**When Statute Is Ambiguous.** — It is well-settled law in this state that when the language of a statute is unclear or ambiguous, a court may interpret the language of the statute in accordance with what the court presumed the legislature intended. Carolina Truck & Body Co. v. GMC, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991).

**Doctrine of the Last Antecedent.** — By what is known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Doctrine of last antecedent is not an absolute rule, however, but merely one aid to the discovery of legislative intent. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

### III. SIMILAR AND RELATED ACTS.

#### B. Statutes in Pari Materia.

**Statutes relating to the same subject, etc.** —

Statutes relating to the same subject should be construed in pari materia, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved. Carolina Truck & Body Co. v. GMC, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991).

### VI. DEFINITIONS.

**Three Calendar Months.** — Plaintiff had three calendar months, not 90 days, in which to file an action; thus, the trial court erred in dismissing plaintiff's cause of action based on the statute of limitations. Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

## § 12-3.1. Fees and charges by agencies.

(a) In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to make and promulgate rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service.

(b) For purposes of this section:

"Agency" means every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government. "Agency" does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, the University of North Carolina, community colleges, hospitals, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

"Rule" means every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency and includes rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

(c) This section does not apply to any of the following:

(1) Rules establishing fees or charges to State, federal or local governmental units.

(2) A reasonable fee or charge for copying, transcripts of public hearings, State publications, or mailing a document or other item.

(3) Reasonable registration fees covering the cost of a conference or workshop.

(4) Reasonable user fees covering the cost of providing data processing services. (1979, c. 559, s. 1; 1981, c. 695, ss. 1, 2; 1987, c. 564, s. 35; 1991, c. 418, s. 6.)

**Cross References.** — For the definition of "public records", see § 132-1. For provision regarding provisions for copies of public records and fees, see § 132-6.2.

# Chapter 13.

# Citizenship Restored.

## § 13-1. Restoration of citizenship.

### CASE NOTES

**Proof of Violation of 18 U.S.C. § 922(g)(1). —**

Because defendant's state felony conviction occurred within five years of a firearm offense, under North Carolina Felony Firearms Act (§ 14-415) the defendant's civil rights could not have been fully restored, and the government proved a firearm possession violation despite the fact that it did not independently establish that defendant's civil rights had not been restored at the time of his firearm possession. United States v. Thomas, 52 F.3d 82 (4th Cir. 1995).

# Chapter 14.

# Criminal Law.

## SUBCHAPTER I. GENERAL PROVISIONS.

### Article 1.

### Felonies and Misdemeanors.

Sec.
14-1.1 through 14-2.1. [Repealed.]
14-2.2. Sentencing of a person convicted of a Class A, B, B1, B2, C, D, or E felony who used, displayed, or threatened to use or display a firearm during the commission of the crime; confiscation and disposition of a firearm used in a felony.
14-2.4. Punishment for conspiracy to commit a felony.
14-2.5. Punishment for attempt to commit a felony or misdemeanor.
14-2.6. Punishment for solicitation to commit a felony or misdemeanor.
14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.
14-4. Violation of local ordinances misdemeanor.

### Article 2.

### Principals and Accessories.

14-5.2. Accessory before fact punishable as principal felon.

### Article 2A.

### Habitual Felons.

14-7.6. Sentencing of habitual felons.

### Article 2B.

### Violent Habitual Felons.

14-7.7. Persons defined as violent habitual felons.
14-7.8. Punishment.
14-7.9. Charge of violent habitual felon.
14-7.10. Evidence of prior convictions of violent felonies.
14-7.11. Verdict and judgment.
14-7.12. Sentencing of violent habitual felons.
14-7.13 through 14-7.19. [Reserved.]

### Article 2C.

### Continuing Criminal Enterprise.

Sec.
14-7.20. Continuing criminal enterprise.

## SUBCHAPTER II. OFFENSES AGAINST THE STATE.

### Article 3.

### Rebellion.

14-9. [Repealed.]

### Article 5.

### Counterfeiting and Issuing Monetary Substitutes.

14-13. Counterfeiting coin and uttering coin that is counterfeit.
14-14. Possessing tools for counterfeiting.

## SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

### Article 6.

### Homicide.

14-17. Murder in the first and second degree defined; punishment.
14-18.1. [Repealed.]
14-20. [Repealed.]

### Article 7A.

### Rape and Other Sex Offenses.

14-27.2. First-degree rape.
14-27.4. First-degree sexual offense.
14-27.6. [Repealed.]
14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

### Article 8.

### Assaults.

14-32.1. Assaults on handicapped persons; punishments.
14-32.2. Patient abuse and neglect; punishments.
14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.
14-33. Misdemeanor assaults, batteries,

Sec.

and affrays, simple and aggravated; punishments.

14-33.2. Habitual misdemeanor assault.

14-34. Assaulting by pointing gun.

14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.

14-34.5. Assault with a firearm on a law enforcement officer.

14-34.6. Assault or affray on an emergency medical technician, ambulance attendant, emergency department nurse, or emergency department physician.

### Article 10.

### Kidnapping and Abduction.

14-39. Kidnapping.

14-42. [Repealed.]

14-43. [Repealed.]

### Article 13.

### Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

14-50. [Repealed.]

## SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

### Article 14.

### Burglary and Other Housebreakings.

14-51.1. Use of deadly physical force against an intruder.

### Article 15.

### Arson and Other Burnings.

14-67. [Repealed.]

## SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

### Article 16.

### Larceny.

14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

Sec.

14-72.1. Concealment of merchandise in mercantile establishments.

14-72.3. Removal of shopping cart from shopping premises.

14-72.4. Unauthorized taking or sale of labeled dairy milk cases or milk crates bearing the name or label of owner.

14-78.1. [Repealed.]

14-80. [Repealed.]

14-82. Taking horses, mules, or dogs for temporary purposes.

14-86. [Repealed.]

### Article 17.

### Robbery.

14-89. [Repealed.]

### Article 18.

### Embezzlement.

14-95. [Repealed.]

### Article 19.

### False Pretenses and Cheats.

14-111. [Repealed.]

14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

14-111.3. Making unneeded ambulance request in certain counties.

### Article 19A.

### Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

14-113.5. Making, distributing, possessing, transferring, or programming device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.

14-113.6. Penalties for violation; civil action.

### Article 20.

### Frauds.

14-116. [Repealed.]

14-117.1. [Repealed.]

## SUBCHAPTER VI. CRIMINAL TRESPASS.

### Article 22.

### Damages and Other Offenses to Land and Fixtures.

Sec.

14-133. [Repealed.]

14-138. [Repealed.]

14-138.1. Setting fire to grassland, brushland, or woodland.

14-140. [Repealed.]

14-140.1. Certain fire to be guarded by watchman.

### Article 23.

### Trespasses to Personal Property.

14-161. [Repealed.]

14-163.1. Injuring, maiming, or killing law-enforcement agency animal.

14-164. [Repealed.]

### Article 25.

### Regulating the Leasing of Storage Batteries.

14-170 through 14-176. [Repealed.]

## SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

### Article 26.

### Offenses against Public Morality and Decency.

14-190.16. First degree sexual exploitation of a minor.

14-190.18. Promoting prostitution of a minor.

14-195. [Repealed.]

14-200, 14-201. [Repealed.]

14-202.2. Indecent liberties between children.

14-202.3 through 14-202.9. [Reserved.]

### Article 27.

### Prostitution.

14-208.1 through 14-208.4. [Reserved.]

### Article 27A.

### Sexual Offender Registration Program.

14-208.5. Purpose.

14-208.6. Definitions.

14-208.7. Registration.

14-208.8. Prerelease notification.

14-208.9. Change of address.

Sec.

14-208.10. Access to registration information.

14-208.11. Failure to register.

14-208.12. Exemption.

14-208.13. File with Police Information Network.

## SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

### Article 28.

### Perjury.

14-212. [Repealed.]

### Article 30.

### Obstructing Justice.

14-222. [Repealed.]

14-225. False reports to law enforcement agencies or officers.

### Article 31.

### Misconduct in Public Office.

14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

14-235. [Repealed.]

### Article 32.

### Misconduct in Private Office.

14-253. Failure of certain railroad officers to account with successors.

### Article 33.

### Prison Breach and Prisoners.

14-257. [Repealed.]

## SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

### Article 35.

### Offenses Against the Public Peace.

14-269. Carrying concealed weapons.

14-269.1. Confiscation and disposition of deadly weapons.

14-269.2. Weapons on campus or other educational property.

14-269.7. Prohibitions on handguns for minors.

14-269.8. Purchase of firearms by person subject to domestic violence order prohibited.

14-270, 14-271. [Repealed.]

Sec.
14-277.4. Obstruction of health care facilities.

## SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

### Article 36.

### Offenses Against the Public Safety.

14-285. [Repealed.]

### Article 36A.

### Riots and Civil Disorders.

14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.

## SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

### Article 37.

### Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

14-303. Violation of two preceding sections a misdemeanor.
14-309. Violation made misdemeanor.

Part 2. Bingo and Raffles.

14-309.14. Beach bingo.

### Article 38.

### Marathon Dances and Similar Endurance Contests.

14-310 through 14-312. [Repealed.]

### Article 39.

### Protection of Minors.

14-313. Youth access to tobacco products.
14-315. Selling or giving weapons to minors.
14-315.1. Storage of firearms to protect minors.
14-315.2. Warning upon sale or transfer of firearm to protect minor.
14-318.2. Child abuse a Class 1 misdemeanor.

### Article 44.

### Regulation of Sales.

14-345. [Repealed.]
14-346.1, 14-346.2. [Repealed.]

### Article 45.

### Regulation of Employer and Employee.

Sec.
14-356, 14-357. [Repealed.]

### Article 49.

### Protection of Livestock Running at Large.

14-368. Placing poisonous shrubs and vegetables in public places.
14-369. [Repealed.]

### Article 52.

### Miscellaneous Police Regulations.

14-386. [Repealed.]
14-389. [Repealed.]
14-396, 14-397. [Repealed.]
14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited.
14-401.14. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

### Article 52A.

### Sale of Weapons in Certain Counties.

14-403. Permit issued by sheriff; form of permit; expiration of permit.
14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

### Article 53.

### Sale of Weapons in Certain Other Counties.

14-409.1 through 14-409.9. [Repealed.]

### Article 54.

### Sale, etc., of Pyrotechnics.

14-410. Manufacture, sale and use of pyrotechnics prohibited; exceptions; sale to persons under the age of 16 prohibited.
14-413. Permits for use at public exhibitions.

### Article 54A.

### The Felony Firearms Act.

14-415.1. Possession of firearms, etc., by felon prohibited.

Sec.
14-415.3. Possession of a firearm or weapon of mass destruction by persons acquitted of certain crimes by reason of insanity or persons determined to be incapable to proceed prohibited.
14-415.4 through 14-415.9. [Reserved.]

Article 54B.

Concealed Handgun Permit.

14-415.10. Definitions.
14-415.11. Permit to carry concealed handgun; scope of permit.
14-415.12. Criteria to qualify for the issuance of a permit.
14-415.13. Application for a permit; fingerprints.
14-415.14. Application form to be provided by sheriff; information to be included in application form.
14-415.15. Issuance or denial of permit.
14-415.16. Renewal of permit.
14-415.17. Permit; sheriff to retain and make available to law enforcement agencies a list of permittees.
Sec.
14-415.18. Revocation or suspension of permit.
14-415.19. Fees.
14-415.20. No liability of sheriff.
14-415.21. Violations of this Article punishable as an infraction and a Class 2 misdemeanor.
14-415.22. Construction of Article.
14-415.23. Statewide uniformity.

Article 60.

Computer-Related Crime.

14-453. Definitions.
14-454. Accessing computers.
14-455. Damaging computers, computer systems, computer networks, and resources.
14-456. Denial of computer services to an authorized user.

**Editor's Note.** — Chapter 24, section 14 of the North Carolina Extra Session amended the effective date provisions of Chapter 538, section 56 and Chapter 539, section 1359 of the 1993 Session Laws by changing the effective date of the changes made by those chapters from January 1, 1995 to October 1, 1994. Many sections in this chapter have been affected by this change.

# SUBCHAPTER I. GENERAL PROVISIONS.

## ARTICLE 1.

## *Felonies and Misdemeanors.*

### § 14-1.1: Repealed by Session Laws 1993, c. 538, s. 2, effective October 1, 1994.

**Cross References.** — As to structured sentencing of persons convicted of crimes, effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 538, s. 2.1 repeals this section effective October 1, 1994. Section 56 of Session Laws 1993, c. 538, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

### § 14-2: Repealed by Session Laws 1993, c. 538, s. 2.1, effective October 1, 1994.

**Cross References.** — As to structured sentencing of persons convicted of crimes, effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 538, s. 2.1 repeals this section effective

October 1, 1994. Section 56 of Session Laws 1993, c. 538, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-2.1: Repealed by Session Laws 1993, c. 538, s. 3, effective October 1, 1994.

**Cross References.** — As to structured sentencing of persons convicted of crimes, effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 538, s. 3 repeals this section effective October 1, 1994. Section 56 of Session Laws 1993, c. 538, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-2.2. Sentencing of a person convicted of a Class A, B, B1, B2, C, D, or E felony who used, displayed, or threatened to use or display a firearm during the commission of the crime; confiscation and disposition of a firearm used in a felony.

(a) If a person is convicted of a Class A, B, B1, B2, C, D, or E felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months as provided by G.S. 15A-1340.16A.

The court shall not suspend any sentence imposed under this section and shall not place a person sentenced under this section on probation for the sentence imposed under this section. Sentences imposed pursuant to this section shall be consecutive to all other sentences imposed and shall begin at the expiration of any other sentence being served by the person.

(b) Subsection (a) of this section does not apply in any of the following circumstances:

(1) The person is not sentenced to an active term of imprisonment.

(2) The evidence of the use, display, or threatened use or display of a firearm is needed to prove an element of the underlying Class A, B, B1, B2, C, D, or E felony.

(3) The person did not actually possess a firearm about his or her person.

(c) When a person is found to have personally used a firearm in the commission or attempted commission of a felony and the firearm is owned by that person, or the serial number on the firearm has been defaced such that ownership is not traceable, the court shall order that the firearm be confiscated and disposed of in any of the ways provided by G.S. 14-269.1 that the court in its discretion deems appropriate.

(d) Repealed by Session Laws 1994, Extra Session, c. 22, s. 19(b), effective October 1, 1994. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, ss. 34, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 538, s. 4; 1994, Ex. Sess., c. 22, ss. 18, 19(a), (b).)

**Editor's Note. —**

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 19(c) repealed Session Laws 1993, c. 538, s. 4, which as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), would have repealed this section effective October 1, 1994.

Subsection (a) was amended by Session Laws 1994, Extra Session, c. 22, s. 19(a), in the coded bill drafting format provided by § 120-20.1. Without engrossing the amendment added a sentence to the end of the first paragraph in subsection (a) which read "Evidence of the use, display, or threatened use or display of a firearm that is needed to prove an element of the underlying felony shall not be used to establish the enhancement under this section." This language is similar to present subsection (b)(2). The section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 24 provides: "Prosecution for, or sentences based on, offenses committed before the effective dates of this Part are not abated or affected by this Part, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 22, s. 18, effective May 1, 1994, and applicable to offenses committed on or after that date, rewrote this section.

The 1994 Extra Session amendment by c. 22, s. 19(a) and (b), effective on the date that Section 56 of Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses committed on or after that date, in subsection (a) substituted "a minimum term of imprisonment for 60 months as provided by G.S. 15A-1340.16A" for "imprisonment for five years" in the first paragraph, and deleted the first sentence of the second paragraph, which read "The court shall not sentence a person sentenced under this section as a committed youthful offender," and repealed subsection (d), relating to applicability of subsection (a).

## § 14-2.4. Punishment for conspiracy to commit a felony.

(a) Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit, except that a conspiracy to commit a Class A or Class B1 felony is a Class B2 felony, a conspiracy to commit a Class B2 felony is a Class C felony, and a conspiracy to commit a Class I felony is a Class 1 misdemeanor.

(b) Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a misdemeanor is guilty of a misdemeanor that is one class lower than the misdemeanor he or she conspired to commit, except that a conspiracy to commit a Class 3 misdemeanor is a Class 3 misdemeanor. (1983, c. 451, s. 1; 1993, c. 538, s. 5; 1994, Ex. Sess., c. 22, s. 12; c. 24, s. 14(b).)

**Editor's Note.** — Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides:

"This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments. —**

The 1994 Extra Session amendment by c. 22, s. 12, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class A or Class B1 felony is a Class B2 felony, a conspiracy to commit a Class B2 felony is a Class C felony, and a conspiracy to commit a" in subsection (a).

### CASE NOTES

**Conviction for Conspiracy and Substantive Offense.** — It is a fundamental principle of substantive criminal law that a defendant may properly be convicted of, and punished for, both conspiracy and the substantive offense which the defendant conspired to commit. Therefore, defendant was properly convicted of, and punished for, both conspiracy to commit murder and first degree murder. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

## § 14-2.5. Punishment for attempt to commit a felony or misdemeanor.

Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor. (1993, c. 538, s. 6; 1994, Ex. Sess., c. 22, s. 11; c. 24, s. 14(b).)

**Editor's Note.** — Session Laws 1993, c. 538, which enacted this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 22, s. 11, effective on the same date that Chapter

538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a" in the second sentence.

## § 14-2.6. Punishment for solicitation to commit a felony or misdemeanor.

(a) Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor.

(b) Unless a different classification is expressly stated, a person who solicits another person to commit a misdemeanor is guilty of a Class 3 misdemeanor. (1993, c. 538, s. 6.1; 1994, Ex. Sess., c. 22, s. 13; c. 24, s. 14(b).)

**Editor's Note.** — Session Laws 1993, c. 538, which enacted this section, in s. 56, effective October 1, 1994, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 22, s. 13, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit" in subsection (a).

## § 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.

(a) Except as provided in subsections (b) and (c), every person who shall be convicted of any misdemeanor for which no specific classification and no specific punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor. Any misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly pursuant to law is classified as follows, based on the maximum punishment allowed by law for the offense as it existed on the effective date of Article 81B of Chapter 15A of the General Statutes:

(1) If that maximum punishment is more than six months imprisonment, it is a Class 1 misdemeanor;
(2) If that maximum punishment is more than 30 days but not more than six months imprisonment, it is a Class 2 misdemeanor; and
(3) If that maximum punishment is 30 days or less imprisonment or only a fine, it is a Class 3 misdemeanor.

Misdemeanors that have punishments for one or more counties or cities pursuant to a local act of the General Assembly that are different from the generally applicable punishment are classified pursuant to this subsection if not otherwise specifically classified.

(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony.

(c) If any Class 2 or Class 3 misdemeanor is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class 1 misdemeanor. If any Class 1 misdemeanor offense is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class I felony. (R.C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C.S., s. 4173; 1927, c. 1; 1967, c. 1251, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 2, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 702, s. 2; 1993, c. 538, s. 7; 1994, Ex. Sess., c. 14, s. 2; c. 24, s. 14(b).)

**Editor's Note. —**

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —**

The 1994 Extra Session amendment by c. 14, s. 2, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Statutes:" for "Statutes." at the end of the introductory language of subdivision (a)(1).

## CASE NOTES

I. General Consideration.
III. Particular Offenses.

### I. GENERAL CONSIDERATION.

**Failure to Instruct on Lesser-Included Offense.** — Where there was substantial evidence which would have supported a reasonable finding that defendant committed the lesser-included offense of attempted murder, the trial court erred in failing to instruct the jury on the lesser-included offense of attempted murder. State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993).

**Cited** in State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993).

**III. PARTICULAR OFFENSES.**

**An attempt to commit murder** is an infamous misdemeanor specifically elevated by subsection (b) to the status of a Class H felony. State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993).

## § 14-4. Violation of local ordinances misdemeanor.

(a) Except as provided in subsection (b), if any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor and shall be fined not more than five hundred dollars ($500.00). No fine shall exceed fifty dollars ($50.00) unless the ordinance expressly states that the maximum fine is greater than fifty dollars ($50.00).

(b) If any person shall violate an ordinance of a county, city, or town regulating the operation or parking of vehicles, he shall be responsible for an infraction and shall be required to pay a penalty of not more than fifty dollars ($50.00). (1871-2, c. 195, s. 2; Code, s. 3820; Rev., s. 3702; C.S., s. 4174; 1969, c. 36, s. 2; 1985, c. 764, s. 2; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991, c. 415, s. 1; c. 446, s. 1; 1993, c. 538, s. 8; c. 539, s. 9; 1994, Ex. Sess., c. 24, ss. 14(b), 14(c); 1995, c. 509, s. 133.1.)

**Editor's Note.** —

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 538, s. 8, effective October 1, 1994, substituted "Class 3 misdemeanor" for "misdemeanor and shall be fined not more than five hundred dollars ($500.00), or imprisoned for not more than 30 days" in the first sentence of subsection (a). This amendment was subsequently repealed by Session Laws 1995, c. 509, s. 133.1, effective July 29, 1995.

## ARTICLE 2.

## *Principals and Accessories.*

## § 14-5.2. Accessory before fact punishable as principal felon.

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony. (1981, c. 686, s. 1; 1994, Ex. Sess., c. 22, s. 6.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applies to offenses occurring on or after the effective date of this Part. Prosecution for offenses occurring before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 22, s. 6, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after the effective date substituted "Class B2 felony" for "Class B felony" in the last sentence.

## CASE NOTES

II. Elements of the Offense.
III. Practice and Procedure.
  A. In General.

### II. ELEMENTS OF THE OFFENSE.

**Where crimes of intent are involved,** the accused accessory typically did or said something which would tend to show that he at least anticipated that the plan he encouraged might lead to the "consequential" crime in question; once an accessory before the fact has counseled, procured or planned a criminal event, he must answer for all crimes flowing from the accomplished event. State v. Marr, 113 N.C. App. 774, 440 S.E.2d 275, cert. granted, 336 N.C. 612, 447 S.E.2d 407 (1994).

### III. PRACTICE AND PROCEDURE.

#### A. In General.

**Sentences For Capital Felonies.** — Although it was error for the trial court to fail to submit the special question to the jury regarding the basis of its verdict on the capital murder charge, since under the law in effect prior to October 1, 1994, both a Class A felony and a Class B felony required mandatory life sentences, the defendant was not prejudiced by the trial court's error. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

# § 14-7. Accessories after the fact; trial and punishment.

## CASE NOTES

**Evidence Held Sufficient.** — The state presented sufficient evidence of the elements of accessory after the fact to withstand a motion to dismiss. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

**Cited** in State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

## ARTICLE 2A.

## *Habitual Felons.*

### § 14-7.1. Persons defined as habitual felons.

**Legal Periodicals.** — For note, "The Treatment of Foreign Country Convictions As Predicates for Sentence Enhancement Under Recidivist Statutes," see 44 Duke L.J. 134.

#### CASE NOTES

**Persons Intended to Be Affected.** — The manifest intent of the General Assembly in enacting the Habitual Felon Act was to insure lengthier sentences for those persons who repeatedly violate the criminal laws of this State. Nowhere in the Act is there any indication that the Act was intended to apply only to those persons who repeatedly violate the same criminal law, and the court declined to write any such requirement into the law. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

**Being an habitual felon is not a crime but is a status, etc.** — Because this section simply defines certain persons to be habitual felons, who, as such, are subject to greater punishment for criminal offenses, being an habitual felon is not a crime and cannot support, standing alone, a criminal sentence; rather, being an habitual felon is a status justifying an increased punishment for the principal felony. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

**Separate Hearing to Determine Status Not Required.** — The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony; the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

**Sentence Enhancement.** — The State did not present substantial evidence that third conviction relied upon to enhance sentence as a habitual felon was a felony, where State presented it's evidence regarding the questioned offense through a court clerk who read the contents of an out of state indictment and judgment for the offense, the indictment did not charge defendant with felonious possession of stolen property, and did not recite that defendant pled guilty to a felony or was sentenced as a felon, and there was no certification from any official that the offense to which defendant pled was a felony in that state at the time. State v. Lindsey, 118 N.C. App. 549, 455 S.E.2d 909 (1995).

**Change of Date on Indictment.** — It was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment; therefore, because the date alleged in the indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change a date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

**Notice to Defendant of Habitual Offender Allegation Required Before Plea.** — Defendant must have notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

**Cited** in State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995).

## § 14-7.3. Charge of habitual felon.

### CASE NOTES

**Habitual Felon Indictment Ancillary to Indictment for Substantive Felony.** — The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony; the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

**Specific Reference to Predicate Felony Not Required.** — Nothing in the plain wording of this section requires a specific reference to the predicate substantive felony in the habitual felon indictment. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

**Separate Indictments Valid.** — This section does not require that the indictment charging defendant with the underlying felony must also charge that defendant is an habitual felon; where defendant was charged in one bill of indictment with felonious possession of cocaine, and in a separate bill of indictment with being an habitual felon, the indictments were not invalid. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

**Defective Indictment.** — Where the habitual felon indictment did not refer to any underlying felony with which defendant was charged, defendant's indictment as an habitual offender was fatally flawed and the trial court erred in enhancing defendant's sentence on that basis. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

**New Indictment.** — Where there had been no entry of judgment or sentence as to the substantive underlying felony, until judgment was entered upon defendant's conviction of that substantive underlying felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

**Indictment Held Sufficient.** — Habitual felon indictment complied with this section. State v. Smith, 112 N.C. App. 512, 436 S.E.2d 160 (1993).

**Applied** in State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994).

**Cited** in State v. Hawkins, 110 N.C. App. 837, 431 S.E.2d 503 (1993).

## § 14-7.4. Evidence of prior convictions of felony offenses.

### CASE NOTES

**Names Held to Be "Same Name".** — Where the documents introduced to prove defendant's prior conviction for breaking and entering were all identified as accurate copies of the originals, and each of the documents indicated that defendant's name was "Michael Hodge," for purposes of this section "Michael Hodge" and "William Michael Hodge" were the same name, and the documents at issue therefore constituted prima facie evidence that the defendant named in the prior case was the same as the defendant before the court. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

## § 14-7.5. Verdict and judgment.

### CASE NOTES

**A defendant charged as a habitual felon is not defending himself against the predicate substantive felony,** but against a charge that he has at least three prior felony convictions; the trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to, and considered by, the jury. State v.

Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

**Pending, Uncompleted Felony Conviction Required.** — Where there had been no entry of judgment or sentence as to the substantive underlying felony, until judgment was entered upon defendant's conviction of that substantive underlying felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

**New Habitual Felon Indictment Did Not Result in Former Jeopardy.** — Although habitual felon indictment was joined for trial with one underlying charge, the indictment was quashed before defendant was placed on trial upon the charge that he was an habitual felon. The subsequent indictment alleging defendant's status as an habitual felon was still part of, and ancillary to, the prosecution of defendant for an underlying felony, for which no judgment had been entered, and there was no former jeopardy. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

**Cited** in State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993).

## § 14-7.6. Sentencing of habitual felons.

When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced as a Class C felon. In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section. (1967, c. 1241, s. 6; 1981, c. 179, s. 13; 1993, c. 538, s. 9; 1994, Ex. Sess., c. 22, ss. 15, 16; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 16.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This Act shall be known as the Crime Control Act of 1994."

The 1994 Extra Session c. 22, which amended this section, in s. 17 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses committed on or after that date. Prosecution for, or sentences based on, offenses committed before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, s. 16, effective October 1, 1994, repeals Session Laws 1993, c. 538, s. 9, which, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), would have amended this section effective October 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 22 s. 15, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses committed on or after that date, in the first sentence substituted "commits" for "shall commit", and substituted "provided in this Article" for "herein provided"; added the second sentence; deleted the former second, third and fourth sentences regarding seven year minimum term, good time credit, and suspension of sentences; and substituted "under this section" for "hereunder" at the end of the last sentence.

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "the felon has been sentenced as a Class A, B1, or B2 felon)" for "the death penalty or a sentence of life imprisonment is imposed)."

### CASE NOTES

**Cited** in State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

## ARTICLE 2B.

## *Violent Habitual Felons.*

### § 14-7.7. Persons defined as violent habitual felons.

(a) Any person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon. For purposes of this Article, "convicted" means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered thereon when such action occurred on or after July 6, 1967. This Article does not apply to a second violent felony unless it is committed after the conviction or plea of guilty or no contest to the first violent felony. Any felony to which a pardon has been extended shall not, for the purposes of this Article, constitute a felony. The burden of proving a pardon shall rest with the defendant, and this State shall not be required to disprove a pardon. Conviction as an habitual felon shall not, for purposes of this Article, constitute a violent felony.

(b) For purposes of this Article, "violent felony" includes the following offenses:

(1) All Class A through E felonies.

(2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).

(3) Any offense committed in another jurisdiction substantially equivalent to the offenses set forth in subdivision (1) or (2). (1994, Ex. Sess., c. 22, ss. 31, 32.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 22, s. 37 makes this Article effective May 1, 1994.

Session Laws 1994, Extra Session, c. 22, s. 1, effective May 1, 1994, provides: "This Act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, s. 37, effective May 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this Part are not abated or affected by the repeal or amendment in this Part of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

**Effect of Amendments.** — Session Laws 1994, Extra Session, c. 22, s. 32, effective on the date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), rewrote subsection (b) of this section as enacted by Session Laws 1994, Extra Session, c. 22, s. 31.

## § 14-7.8. Punishment.

When a person is charged by indictment with the commission of a violent felony and is also charged with being a violent habitual felon as defined in G.S. 14-7.7, the person must, upon conviction, be sentenced in accordance with this Article, except in those cases where the death penalty is imposed. (1994, Ex. Sess., c. 22, s. 31.)

## § 14-7.9. Charge of violent habitual felon.

An indictment that charges a person who is a violent habitual felon within the meaning of G.S. 14-7.7 with the commission of any violent felony must, in order to sustain a conviction of violent habitual felon, also charge that the person is a violent habitual felon. The indictment charging the defendant as a violent habitual felon shall be separate from the indictment charging the defendant with the principal violent felony. An indictment that charges a person with being a violent habitual felon must set forth the date that prior violent felonies were committed, the name of the state or other sovereign against whom the violent felonies were committed, the dates of convictions of the violent felonies, and the identity of the court in which the convictions took place. A defendant charged with being a violent habitual felon in a bill of indictment shall not be required to go to trial on that charge within 20 days after the finding of a true bill by the grand jury unless the defendant waives this 20-day period. (1994, Ex. Sess., c. 22, s. 31.)

## § 14-7.10. Evidence of prior convictions of violent felonies.

In all cases where a person is charged under this Article with being a violent habitual felon, the records of prior convictions of violent felonies shall be admissible in evidence, but only for the purpose of proving that the person has been convicted of former violent felonies. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1994, Ex. Sess., c. 22, s. 31.)

## § 14-7.11. Verdict and judgment.

When an indictment charges a violent habitual felon with a violent felony as provided in this Article and an indictment also charges that the person is a violent habitual felon as provided in this Article, the defendant shall be tried for the principal violent felony as provided by law. The indictment that the person is a violent habitual felon shall not be revealed to the jury unless the jury finds that the defendant is guilty of the principal violent felony or another violent felony with which the defendant is charged. If the jury finds the defendant guilty of a violent felony, the bill of indictment charging the defendant as a violent habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of violent habitual felon were a principal charge. If the jury finds that the defendant is a violent habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not a violent habitual felon, the trial judge shall pronounce judgment on the principal violent felony or felonies as provided by law. (1994, Ex. Sess., c. 22, s. 31.)

### § 14-7.12. Sentencing of violent habitual felons.

A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. Life imprisonment without parole means that the person will spend the remainder of the person's natural life in prison. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences for violent habitual felons imposed under this Article shall run consecutively with and shall commence at the expiration of any other sentence being served by the person. (1994, Ex. Sess., c. 22, s. 31.)

**§§ 14-7.13 through 14-7.19:** Reserved for future codification purposes.

## Article 2C.

## *Continuing Criminal Enterprise.*

### § 14-7.20. Continuing criminal enterprise.

(a) Any person who engages in a continuing criminal enterprise shall be punished as a Class H felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.

(b) Any person who is convicted under subsection (a) of this section of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:

(1) The profits obtained by the person in the enterprise, and
(2) Any of the person's interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:

(1) The person violates any provision of this Chapter, the punishment of which is a felony; and
(2) The violation is a part of a continuing series of violations of this Chapter:
  a. Which are undertaken by the person in concert with five or more other persons with respect to whom the person occupies a position of organizer, a supervisory position, or any other position of management; and
  b. From which the person obtains substantial income or resources. (1995, c. 378, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 378, s. 7, provides that this article is effective December 1, 1995, and is applicable to offenses committed on or after that date.

# SUBCHAPTER II. OFFENSES AGAINST THE STATE.

## Article 3.

## *Rebellion.*

### § 14-8. Rebellion against the State.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-9: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(1), effective October 1, 1994.

**Cross References.** — As to structured sentencing of persons convicted of crimes, effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-10. Secret political and military organizations forbidden.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 4.

## *Subversive Activities.*

### § 14-12. Punishment for violations.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 4A.

## *Prohibited Secret Societies and Activities.*

### § 14-12.15. Punishment for violation of Article.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 5.

## *Counterfeiting and Issuing Monetary Substitutes.*

### § 14-13. Counterfeiting coin and uttering coin that is counterfeit.

If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the State; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the State from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be punished as a Class I felon. (1811, c. 814, s. 3, P.R.; R.C., c. 34, s. 64; Code, s. 1035; Rev., s. 3422; C.S., s. 4181; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1123; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 379, s. 1(a).)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —**

The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, deleted "a Spanish milled dollar, or" following "likeness of".

### § 14-14. Possessing tools for counterfeiting.

If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of any coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the State, and shall be duly convicted thereof, the person so offending shall be punished as a Class I felon. (1811, c. 814, s. 4, P.R.; R.C., c. 34, s. 65; Code, s. 1036; Rev., s. 3423; C.S., s. 4182; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316,

s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1124; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 379, s. 1(b).)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —**

The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, substituted "any" for "a Spanish milled dollar, or other" preceding "coin".

## § 14-15. Issuing substitutes for money without authority.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-16. Receiving or passing unauthorized substitutes for money.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 5A.

## *Endangering Executive and Legislative Officers.*

## § 14-16.6. Assault on executive or legislative officer.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-16.7. Threats against executive or legislative officers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

## Article 6.

## *Homicide.*

### § 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 17 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. Provided, however, any person under the age of 17 who commits murder in the first degree while serving a prison sentence imposed for a prior murder or while on escape from a prison sentence imposed for a prior murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(a)4., when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 1, 2; c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 662, s. 1; 1987, c. 693; 1989, c. 694; 1993, c. 539, s. 112; 1994, Ex. Sess., c. 21, s. 1; c. 22, s. 4; c. 24, s. 14(c).)

**Cross References.** — As to provisions regarding transfer to superior court, see § 7A-608. As to provisions regarding controlled substances, see § 90-90.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 21, which amended this section, in s. 8 provides: "This act becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994], and applies to offenses occurring on or after that date. Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal, expiration, or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994]. This Part applies to offenses occurring on or after the effective date of this Part. Prosecutions for offenses committed before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments. —**

Session Laws 1994, Extra Session, c. 21, s. 1, effective on the date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "without parole" following "life" twice in the first sentence, and once in the second sentence.

Session Laws 1994, Extra Session, c. 22, s. 4, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class B2 felon" for "Class B felon" in the last sentence.

**Legal Periodicals. —**

For note, "State v. Jennings: Public Fervor, the North Carolina Supreme Court, and Society's Ultimate Punishment," see 72 N.C.L. Rev. 1672 (1994).

## CASE NOTES

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### I. GENERAL CONSIDERATION.

**The degrees of homicide may be defined as follows:** Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of another human being with malice but without premeditation and deliberation. Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under the influence of some passion or heat of blood produced by adequate provocation. State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994).

**There are two kinds of provocation relating to the law of homicide:** One is that level of provocation which negates malice and reduces murder to voluntary manslaughter; the other is provocation sufficient to incite defendant to act suddenly and without deliberation. State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994).

**An accessory before the fact may be tried for first-degree murder although the principal has pled guilty to second-degree murder.** State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Stated** in State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993).

**Cited** in State v. Stanley, 110 N.C. App. 87, 429 S.E.2d 349 (1993); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (1993); State v. Dobson, 337 N.C. 464, 446 S.E.2d 14 (1994); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. House, 340 N.C. 187, 456 S.E.2d 292 (1995).

## II. MURDER IN THE FIRST DEGREE GENERALLY.

**Premeditation means thought of beforehand, for some length of time, however short.**

Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

**Deliberation Means That the Act is Done in Cool State of Blood. —**

Deliberation means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

**Premeditation and Deliberation Must Usually Be Proved by Circumstantial Evidence. —**

Premeditation and deliberation usually are not proved by direct evidence but by actions and circumstances surrounding the killing. State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

**Evidence Held Sufficient. —**

The evidence was substantial as to each element of the offense of first-degree murder and the defendant being the perpetrator. State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994).

The fact that defendant went to great lengths to conceal murder, including disposing of the body and destroying or hiding evidence such as the pipe, the sheets, and the mattress and his uncaring attitude about the victim, evidenced by killing her and then dumping her nude body by the roadside, could all be considered by the jury in finding premeditation and deliberation. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Evidence was sufficient to support a conclusion that defendant acted with malice, premeditation and deliberation where defendant and the victim fought earlier in the evening, defendant followed the victim to a convenience store parking lot, defendant shot the victim after the victim had turned his back to defendant and was walking away, and defendant knew the victim was unarmed. State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994).

Evidence held sufficient to prove that defendant committed premeditated and deliberate murder. State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995).

**Evidence Held Sufficient to Raise Inference of Premeditation and Deliberation.** — Where the evidence, taken in the light most favorable to the State, showed that no knives or other weapons were found at the scene of the crime and no drawers were open; the victim was shot three times, once in the back; prior to the day of the shooting, defendant threatened, "If I ever come here and see another man in this house, I'll kill him"; and after the shooting, defendant told lieutenant that he had shot two people but did not at that time claim that he had done so in self-defense; this evidence raised the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense, and the trial court did not err in submitting the first-degree murder charge based on premeditation and deliberation. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

**Evidence held sufficient to support a charge of conspiracy to commit murder.** State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

## III. MURDER BY MEANS STATED IN SECTION.

**A murder perpetrated by means of poison is murder in the first degree, etc. —**

When a murder is committed by means of poison, premeditation and deliberation are not elements of the crime of first-degree murder and premeditation and deliberation are hence irrelevant. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, — U.S. —, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

**Evidence of Murder by Lying in Wait. —**

Where the State's evidence tended to show that the defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, leading to her death, the evidence clearly supported submission to the jury of murder by lying in wait. State v.

Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

## IV. MURDER IN PERPETRATION OF A FELONY.

**Unbroken Chain of Events Is Required.** —

In felony murder, the killing may, but need not, be intentional. There must, however, be an unbroken chain of events leading from the attempted felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

**Assault with a Deadly Weapon with Intent to Kill.** — Where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury under § 14-32, which is a felony involving use of a deadly weapon, the crime was thus within the purview of the felony-murder statute. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

**Merger of Underlying Felony into Murder Conviction.** —

A defendant may not be punished both for felony murder and for the underlying, predicate felony. Thus, the underlying felony supporting a conviction for felony murder merges into the murder conviction, provides no basis for an additional sentence, and any judgment imposed thereon must be arrested. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

**Evidence of Murder in Perpetration of Felony Held Sufficient.** —

Where the felony murder theory upon which the case was submitted was fully supported by the evidence, failure to submit the case on a transferred intent theory, that might also have been supported by the evidence, gave defendant no cause to complain. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Since the evidence supported the guilt of both defendants as to all of the felonious assaults, it made no difference which of the felonious assaults was the underlying felony, which defendant actually fired the fatal shots or whether defendants intended that the victim be killed. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

The evidence was sufficient to support a conclusion that murder was premeditated and deliberate where defendant carried a gun readied for firing during attempted robbery, indicating he anticipated a violent confrontation and the potential need for deadly force, and there was a lack of provocation on the part of the victim. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

## V. MURDER IN THE SECOND DEGREE.

**No Evidence to Warrant Instruction on Second-Degree Murder.** — Where the jury returned a verdict that defendant was guilty of first-degree murder under the felony-murder rule and not of premeditated and deliberated murder, no evidence in the record warranted submission of an instruction on second-degree murder. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

**Jury Question Warranted.** — Sufficient evidence was found to allow the issue of defendant's guilt of second-degree murder to be submitted to the jury. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

**Course of Conduct.** — Where the offenses of first-degree murder and assault with a deadly weapon were joined offenses for which defendant was convicted contemporaneously with his conviction for second-degree murder, a Class C felony covered by the Fair Sentencing Act, finding these offenses to have established a "course of conduct" in aggravation of second-degree murder, violated the prohibition of such factors in State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985); therefore, defendant was entitled to resentencing in the second-degree murder case, where the "course of conduct" aggravating factor would not be considered. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

**Evidence Held Sufficient.** —

While evidence tended to show that defendant may have killed her husband, it did not necessarily lead to the conclusion that defendant first premeditated and deliberated his death; thus, the evidence supported a finding of second-degree murder. State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994), cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993).

**Evidence Held Insufficient.** —

Evidence that the defendant and the victim argued, without more, was insufficient to show that the defendant's anger was strong enough to disturb his ability to reason, and without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder. State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995).

## VI. DEFENSES AND DENIALS.

### D. Intoxication.

**Instruction on Intoxication Not Required.** — Where the defendant did not make the requisite showing that he and co-conspirator was utterly incapable of forming the requisite intent, the trial court did not err in failing to give an instruction on voluntary intoxication. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

### E. Provocation.

**These facts do not show legal provocation:** Defendant's statement to the police, admitting that he shot victim for refusing to hand over money from cash register, constituted substantial evidence that defendant was not provoked. State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995).

### F. Self-Defense.

**Except in special circumstances, self-defense is not an available defense to felony murder.** State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

**Self-Defense and Felony Murder.** — Absent (i) a reasonable basis upon which the jury may have disbelieved the prosecution's evidence of the underlying felony; (ii) a factual showing that defendant clearly articulated his intent to withdraw from the situation; or (iii) a factual showing that at the time of the violence the dangerous situation no longer existed, defendant has forfeited his right to claim self-defense as a defense to felony murder. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

**Excessive Force Basis for Imperfect Self-Defense.** — Whether defendant used excessive force is a question for the jury to determine; thus, the trial court properly instructed jury that if it found defendant to have used excessive force in defending himself, he was entitled, at most, to the defense of imperfect self-defense. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

**Instruction on Self-Defense Not Required.** — If there is no evidence from which a jury reasonably could find that the defendant in fact believed that it was necessary to kill to protect another from death or great bodily harm, the defendant is not entitled to have the jury instructed on either perfect or imperfect defense of another. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

**The evidence was not sufficient to warrant an instruction on either perfect or imperfect self-defense** where defendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm, nor was there evidence that if defendant had formed such a belief, the belief was reasonable under the circumstances; defendant's own statement acknowledged that the victim was unarmed and walking away from defendant when defendant shot him in the back, and thus, defendant was not facing an imminent threat of death or great bodily harm from the victim when defendant fired the fatal shot. State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994).

**Defendant was not entitled to instruction on voluntary manslaughter based on imperfect self-defense** where the evidence showed defendant shot the unarmed victim in the back as the victim was walking away from defendant. There was no evidence that defendant believed it necessary to kill the victim in order to save himself, and if defendant had presented evidence of such a belief, the belief would not have been reasonable under the circumstances. State v. Exxum, 338 N.C. 297, 449 S.E.2d 554 (1994).

## VII. EVIDENCE.

### A. In General.

**Failure to Produce or Contradict Evidence.** — Although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the state may properly be brought to the jury's attention by the state in its closing argument. State v. Taylor, 337 N.C. 597, 447 S.E.2d 360 (1994).

**Improper Reference to Defendant's Silence.** — Because the State wrongfully referred to the defendant's silence in the face of the agent's accusation of murder, and it allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence, the testimony should have been excluded. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

**Evidence Sufficient to Prove Accessory Before the Fact.** — Evidence held sufficient to convict defendant of being an accessory before the fact to murder committed by his teenage girlfriend by burning her grandparents' house. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

**Premeditation and Deliberation Shown.** — Fact that defendant carried a loaded .32-caliber pistol for several days prior to robbery and murder, and threatened two persons with this weapon during two armed robberies just days before he killed victim with it, supported inference of premeditation and deliberation, as did defendant's conduct in removing money and keys from victim and money from cash register after he shot the victim while he lay bleeding on the floor. State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995).

Evidence of premeditation and deliberation held sufficient to support first-degree murder conviction of 14 year old defendant who killed and robbed stepfather who drank and abused his family. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

Evidence held sufficient to permit a reasonable jury to find beyond a reasonable doubt that defendant shot the victim with premeditation and deliberation and was guilty of first-degree murder. State v. Baity, 340 N.C. 65, 455 S.E.2d 621 (1995).

The fact that one of two defendants drew his pistol, pointed it at victim, a pawnshop clerk and then told him, "Don't even try it," prior to shooting him was sufficient evidence of premeditation and deliberation to support a charge of first-degree murder. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

**Sufficiency of Evidence to Deny Motion to Dismiss.** — Evidence tending to show defendant was the perpetrator of the homicide was sufficient to justify the trial court's denial of defendant's motion to dismiss. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

**Admissible Evidence.** — All statements made by defendant were fully authorized by the defendant and did not constitute a breach of the attorney-client privilege or any other right of the defendant and it was not error for the trial court to allow evidence of the defendant's statements to be admitted. State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994).

## VIII. INSTRUCTIONS.

### A. In General.

**Ability to Form Specific Intent.** — The trial court committed reversible error in refusing to instruct the jury to consider the defendant's mental condition in connection with his ability to form a specific intent to kill and instead gave the pattern instruction which explains intent as a state of mind or mental attitude which may be inferred from surrounding circumstances rather than by direct evidence. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

**Killing Must Have Been Intentional.** —

A charge, in the court's final mandate, that the jury had to be satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation, also charged that the killing had to be intentional. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

**Instruction Permitting Verdict of Guilty of Voluntary Manslaughter.** — Where the jury was instructed that it could find defendant guilty of first-degree murder, second-degree murder, or not guilty, and the jury returned a verdict of guilty of first-degree murder, any error in the trial court's failure to instruct the jury on voluntary manslaughter was harmless. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

**Instruction on acting in concert, etc.** —

Although evidence adduced at trial would support a jury finding that the defendant acted in perfect defense of another, as it also would support a finding that the defendant and another acted in concert to commit first-degree murder, the trial court properly gave an instruction on the acting in concert theory. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

### B. Degree of Offense.

**When Jury May Be Instructed to Find Defendant Guilty of First-Degree Murder or Not Guilty.** —

If the evidence is sufficient to fully satisfy the state's burden of proving each and every element of the offense of first-degree murder and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, second-degree murder should not be submitted to the jury. State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994).

The absence of self-defense is not an "element" of murder, nevertheless, upon the particular evidence presented, the trial court correctly instructed the jury that to convict the defendant of murder in the first degree the jury must find that he did not act in self-defense. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994).

**Where there was a conflict in the evidence regarding whether the defendant lay in wait,** the evidence supported submission to the jury of second-degree murder and voluntary manslaughter. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

For all murder cases prosecuted under this section, when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to § 15-144 and supported by the evidence must be submitted to the jury. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

**Same — Second-Degree Murder. —** Where a defendant is charged with premeditated and deliberate first degree murder, an instruction on the lesser included offense of second degree murder need be given only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

A court should instruct on murder in the second degree only when the evidence would permit a reasonable finding that the defendant's anger and emotion were strong enough to disturb the defendant's ability to reason. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

**Same — Manslaughter. —** Evidence of several steps taken by two men shot by the defendant, who were admittedly the defendant's friends, did not amount to evidence of either an assault or a threatened assault that would rise to the level of provocation which would "render the mind incapable of cool reflection," and therefore, did not warrant the requested instruction on voluntary manslaughter. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

**Second-Degree Murder Instruction Not Required. —** Where the evidence, viewed as a whole, was insufficient to negate the elements of premeditation and deliberation, the trial court did not err in failing to instruct the jury on second-degree murder and only charging on possible verdicts of guilty of murder in the first degree or not guilty. State v. Arrington, 336 N.C. 592, 444 S.E.2d 418 (1994).

**Involuntary Manslaughter Instruction Not Required. —** Where a jury is properly instructed on the elements of first and second degree murder and thereafter returns a verdict of guilty of first degree murder based on premeditation and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**Failure to Charge on Voluntary Manslaughter Not Prejudicial. —** Where the court submitted to the jury possible verdicts of first-degree murder, second-degree murder, and not guilty, and the jury convicted the defendants of first-degree murder, even if there was sufficient evidence to support an instruction on voluntary manslaughter, in light of the jury's verdict, the trial court's failure to give an instruction was thereon harmless error. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Where the trial court instructed the jury that it could find defendant guilty of first-degree murder, based either on the theory of premeditation and deliberation or the theory of felony murder, guilty of second-degree murder, or not guilty, and the jury returned a verdict of first-degree murder on both theories submitted, even if it was error to fail to instruct the jury regarding voluntary manslaughter, such error was harmless. State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995).

## X. PLEAS OF GUILTY AND NOT GUILTY.

**Defendant's Consent to Plea. —** Just prior to closing arguments defendant consented on the record to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter. As per se error is based on a defendant not consenting to his counsel's admission of his guilt, defendant's consent prior to the closing arguments amounted to ratification of defense counsel's earlier statement and cured any possible error. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994).

### XII. CAPITAL PUNISHMENT.

**Retroactive Applicability of Invalidity of Unanimity Requirement. —** The 1990 case of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), which invalidated the unanimity requirement of North Carolina's capital sentencing scheme, should be applied retroactively to capital cases which became final before McKoy was decided. State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994).

**Prosecutor's Argument. —**

Argument not improper where the prosecutor argued the only way the jury could prevent defendant from killing again was to give him the death penalty. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994).

The prosecutor's argument that the death penalty would prevent the defendant from killing again was a proper argument and his argument that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death, were reasonable arguments in light of the evidence of the defendant's pattern of violent and deadly behavior. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**Sentence Not Disproportionate. —** Where defendant was convicted of three first-degree murders and the record established a cold-blooded, calculated course of conduct on the part of defendant which amounted to a wanton disregard for the value of human life, the two death sentences were not excessive or disproportionate. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994).

### XIII. APPEAL.

**Failure to Preserve Evidence for Review. —** The trial court erred by not allowing the defendant to make an offer of proof and depriving her from preserving the proposed witness testimony in the record for the purpose of appellate review. State v. Brown, 116 N.C. App. 445, 448 S.E.2d 131 (1994).

## § 14-18. Punishment for manslaughter.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

II. Manslaughter.
  B. Voluntary.
  C. Involuntary.
V. Culpable Negligence.
VII. Instructions to Jury.

### II. MANSLAUGHTER.

#### B. Voluntary.

**Issue of Proximate Cause Properly Submitted to Jury. —** In prosecution for voluntary manslaughter, issue of proximate cause of victim's death was properly submitted to the jury, where pathologist testified that victim died as a result of complications from the bullet wound to his chest and abdomen inflicted by defendant, even though victim's death was precipitated by his decision against medical advice to undergo colostomy reversal surgery. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

#### C. Involuntary.

**Evidence of Acting in Concert Lacking. —** The trial court erred in instructing the jury that it could find defendant guilty of involuntary manslaughter on the theory of acting in concert where there was no evidence that defendant and the driver of automobile who killed the victim acted pursuant to a common plan or purpose to commit the crime of involuntary manslaughter. State v. Kaley, 117 N.C. App. 420, 451 S.E.2d 6 (1994).

### V. CULPABLE NEGLIGENCE.

**Violation of Safety Statute or Ordinance. —**

Where defendant's dog attacked and killed jogger, the state presented substantial evidence of each element of the offense of involuntary manslaughter based on culpable negligence where a city safety ordinance was involved. State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (1994).

### VII. INSTRUCTIONS TO JURY.

**Failure to Instruct Defendant Had No Duty to Retreat.** — Where the evidence showed that the victim of a fatal shooting was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief; therefore, as the trial court erred in failing to instruct that defendant had no duty to retreat defendant was entitled a new trial. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

## § 14-18.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 73, effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-20: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 29(1), effective October 1, 1994.

**Cross References.** — For structured sentencing provisions effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Repealed § 14-20 would have been amended by Session Laws 1994, Extra Session, c. 22, s. 5, effective October 1, 1994. Because of the repeal, the amendment is not set out.

## Article 7A.

## *Rape and Other Sex Offenses.*

## § 14-27.1. Definitions.

### CASE NOTES

**"Substantially Incapable" of Resisting. —**

Evidence was sufficient to show that the injuries to the vagina were inflicted on the victim by defendant in an attempt to commit anal intercourse or in furtherance of the anal intercourse, and therefore, as part of one continuous transaction, the rape and the ensuing serious injuries the victim suffered as a result of the rape wore down the victim's resistance and contributed to her submission so that defendant was able to inflict further personal injury on the victim with the sexual offense of anal intercourse. State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994), cert. granted, 339 N.C. 741, 454 S.E.2d 660 (1995).

## § 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 63; c. 106, ss. 1, 2; c. 179, s. 14; 1983, c. 175, ss. 4, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 2.)

**Editor's Note. —**

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994]. This Part applies to offenses occurring on or after the effective date of this Part. Prosecutions for offenses committed before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective October 1, 1994 substituted "Class B1 felony" for "Class B felony" in subsection (b).

**Legal Periodicals. —**

For comment, "Old Wine in New Bottles: The 'Marital' Rape Allowance," see 72 N.C.L. Rev. 261 (1993).

### CASE NOTES

I. General Consideration.
II. Indictment.
VIII. Serious Personal Injury.
XI. Penetration.
XIII. Evidence.
XIV. Instructions.

### I. GENERAL CONSIDERATION.

**Elements Required.** — In order to prove first-degree rape, it is sufficient that the State demonstrate that the defendant engaged in vaginal intercourse with another person by force and against the will of the other person and either (1) employed or displayed a dangerous weapon or (2) inflicted serious personal injury upon the victim or another person. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

**Cited** in State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. McClain, 112 N.C. App. 208, 435 S.E.2d 371 (1993); State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994); State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

### II. INDICTMENT.

**Failure of Indictment to Allege Date of Crime.** — Because time did not constitute an element of first-degree rape, time was not of the essence of the crime; accordingly, in a case where the failure of the indictments to allege any date on which the offenses occurred would not be grounds for dismissal of the charges, the designation of a two-year period was not grounds for dismissal. State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300, appeal dismissed, cert. denied, 334 N.C. 437, 433 S.E.2d 182 (1993).

### VIII. SERIOUS PERSONAL INJURY.

**But Must Be Greater Than That Present in Every Rape. —**

In order to prove a serious personal injury based on mental or emotional harm there is no requirement that the mental injury arise from an action not ordinarily present in a forcible rape; what is required is that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape. State v. Baker, 336 N.C. 58, 441 S.E.2d 551 (1994).

**Sufficiency of Evidence. —**

The mental injuries at issue extended for some appreciable time beyond the incidents surrounding the crime itself where the victim experienced weight loss for ten months after the rape; 12 months after the rape, she was still experiencing depression, was unable to sleep, and did not feel comfortable interacting with the public; the victim had quit work, moved from her home, and sought counseling; and after the rape, the victim was unable to carry out her role as a mother and had to give up her child to the child's grandmother for care for nine months. State v. Baker, 336 N.C. 58, 441 S.E.2d 551 (1994).

Testimony of victim that she moved out of her home because she was "scared to go back" home, was not sufficient evidence to support the conclusion that the victim sustained a "serious" personal injury. State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994), cert. granted, 339 N.C. 741, 454 S.E.2d 660 (1995).

### XI. PENETRATION.

**Slightest Penetration Is Sufficient to Withstand a Motion to Dismiss. —** Testimony by child prosecutrix that defendant inserted his penis at least partially into her vagina was sufficient to show that defendant engaged in vaginal intercourse with prosecutrix, and discrepancies between the victim's testimony and the physical evidence, were for the jury to resolve and did not warrant dismissal of the discharge. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

### XIII. EVIDENCE.

**Evidence Held Sufficient to Support Force Element. —** The evidence reasonably supported the inference that the victim had vaginal intercourse with defendant by force and against her will where her body was severely beaten, and testimony indicated that she was alive during the beating. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994).

**Evidence Held Sufficient. —**

There was sufficient evidence from which a rational trier of fact could find in the present case that the defendant engaged in vaginal intercourse with victim by force and against her will while either employing a dangerous weapon or inflicting serious personal injury upon her. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

### XIV. INSTRUCTIONS.

**When Charge on Lesser Included Offense Not Warranted. —** When the State seeks a conviction only on the greater offense and tries the case on an "all or nothing basis," the trial court needs to present an instruction on the lesser offense only when the defendant presents evidence thereof or when the State's evidence is conflicting; hence, in case in which the State proceeded on an "all or nothing basis" in prosecution of defendant for first-degree sexual offense and first-degree rape of two year old, the trial court did not err in refusing to instruct the jury on attempted first-degree rape and attempted first-degree sexual assault. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

**When Charge of Attempted Rape Not Required. —**

Where defendant's confession was the only evidence introduced at trial establishing his participation in the gang rape of an 11-year old victim, the trial court correctly refused to instruct the jury on attempted rape. State v. Brown, 112 N.C. App. 390, 436 S.E.2d 163 (1993), petition denied as to additional issues, 335 N.C. 561, 441 S.E.2d 124 (1994), aff'd, 339 N.C. 606, 453 S.E.2d 165 (1995).

**Instruction on Lesser-Included Offense Properly Denied. —** Where both defendant and the victim agreed that weapons were displayed during the altercation, and the only fact in dispute was whether the sex was consensual; the trial court correctly denied the instruction to charge on a lesser-included offense. State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906, cert. denied, 336 N.C. 613, 447 S.E.2d 409 (1994).

## § 14-27.3. Second-degree rape.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

I. General Consideration.
III. Evidence.
IV. Instructions.

### I. GENERAL CONSIDERATION.

**Construction with Other Provisions.** — The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting involve the "use or threat of violence to the person" within the meaning of § 15A-2000(e)(3). State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994).

**Cited** in State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994); State v. Canup, 117 N.C. App. 424, 451 S.E.2d 9 (1994).

### III. EVIDENCE.

**Victim's Mental Status.** — A trial judge has no authority to order a victim to submit to a psychological examination when the victim's mental status is an element of the crime with which the defendant is charged. State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994).

**Destruction of Evidence.** — Destruction of rape kit and all articles of clothing the victim had been wearing the night of the rape after a computer printout indicated that the case had been voluntarily dismissed did not involve reversible error, where the evidence was not exculpatory. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

### IV. INSTRUCTIONS.

**Instruction on Attempted Second-Degree Rape. —**
Where evidence unequivocally showed an act of penetration by defendant, and the only conflict presented by the evidence was whether intercourse was consensual or by force, the trial court did not err in denying request for an instruction on attempted second-degree rape. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

## § 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 63; c. 106, ss. 3, 4; c. 179, s. 14; 1983, c. 175, ss. 5, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 3.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 14 provides: "This Part becomes effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective [October 1, 1994]. This Part applies to offenses occurring on or after the effective date of this Part. Prosecutions for offenses committed before the effective date of this Part are not abated or affected by this Part, and the statutes that would be applicable but for this Part remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class B1 felony" for "Class B felony" in subsection (b).

### CASE NOTES

I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Cited** in Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489; State v. McClain, 112 N.C. App. 208, 435 S.E.2d 371 (1993); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994); State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

## § 14-27.5. Second-degree sexual offense.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Victim's Mental Status.** — A trial judge has no authority to order a victim to submit to a psychological examination when the victim's mental status is an element of the crime with which the defendant is charged. State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994).

**Cited** in State v. Canup, 117 N.C. App. 424, 451 S.E.2d 9 (1994).

**§ 14-27.6:** Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(3), effective October 1, 1994.

## § 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person. (1995, c. 281, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 281, s. 2, provides that this section is effective December 1, 1995, and applies to offenses committed on or after that date.

## § 14-27.8. No defense that victim is spouse of person committing act.

**Legal Periodicals. —**

For comment, "Old Wine in New Bottles: The 'Marital' Rape Allowance," see 72 N.C.L. Rev. 261 (1993).

## ARTICLE 8.

## *Assaults.*

## § 14-28. Malicious castration.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-29. Castration or other maiming without malice aforethought.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-30. Malicious maiming.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-30.1. Malicious throwing of corrosive acid or alkali.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-31. Maliciously assaulting in a secret manner.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Quoted** in State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993).

## § 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## CASE NOTES

I. General Consideration.
II. Other Crimes.
III. Elements of Offense.
VI. Intent to Kill.
VII. Serious Injury.
IX. Instructions to Jury.
XI. Sufficiency of Evidence.

### I. GENERAL CONSIDERATION.

**Stated** in Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993).

**Cited** in State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993); State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (1993); State v. Moore, 111 N.C. App. 649, 432 S.E.2d 887 (1993); Providence Wash. Ins. Co. v. Locklear ex rel. Smith, 115 N.C. App. 490, 445 S.E.2d 418 (1994); State v. Rambert, 116 N.C. App. 80, 446 S.E.2d 599, cert. granted, 338 N.C. 313, 450 S.E.2d 489 (1994); State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995); State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995); State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

### II. OTHER CRIMES.

**Discharging Firearm into Occupied Building Distinguished. —** Discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes, and defendant was properly convicted of, and punished for, both offenses. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

**Felony Murder. —** Where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury under this section, which is a felony involving use of a deadly weapon, the crime was thus within the purview of the felony-murder statute. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

### III. ELEMENTS OF OFFENSE.

**In order for a conviction of crime under the provisions of this section, etc. —** In accord with third paragraph in main volume. See State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

### VI. INTENT TO KILL.

**Transferred Intent Sufficient. —** The requisite mental state for assault with a deadly weapon with intent to kill inflicting serious injury is the intent to kill. Thus, where, the evidence tended to show that defendant possessed the intent to shoot and kill detective, under the doctrine of transferred intent, this intent sufficed as the intent element for the felony of assault upon detective's life with a deadly weapon with intent to kill inflicting serious injury. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

### VII. SERIOUS INJURY.

**Evidence of Infliction of Serious Injury. —** Testimony by the victim that defendant beat him in the head with the butt of defendant's gun, knocking him to the floor, then stood over him and attempted to throw a compressor at his head which struck his shoulder, and that as a result of the compressor striking his shoulder, he was badly bruised, was substantial evidence that defendant inflicted serious injury upon the victim when he struck him with the air conditioning compressor. State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (1994).

### IX. INSTRUCTIONS TO JURY.

**Failure to Submit Lesser Offense Held Not Error. —** In trial for first-degree burglary, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill, where the only evidence which would negate the intent to kill was the defendant's denial that he would have killed victim, the trial court's refusal to submit a jury instruction on the lesser offenses of misdemeanor assault with a deadly weapon and misdemeanor breaking and entering was not error. State v. Owen, 111 N.C. App. 300, 432 S.E.2d 378 (1993).

Where all the evidence tended to show a shooting with a deadly weapon with the intent to kill, the trial court did not err in refusing to submit the lesser offense of assault with a deadly weapon inflicting serious injury. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

### XI. SUFFICIENCY OF EVIDENCE.

**Evidence of Infliction of Serious Injury.** —

Where the evidence tended to show that the force of shotgun blasts into truck drove shards of glass into the arm and shoulder of victim, blood was observed on his arm, treatment for the injuries was given and officer testified that when he arrived at the hospital victim was very shaken, there was sufficient evidence of injury presented at trial to withstand defendants' motion to dismiss. State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994).

**Evidence Sufficient to Support Guilt of Multiple Defendants.** — Where the evidence supported the guilt of both defendants as to all of the felonious assaults, it made no difference which of the felonious assaults was the underlying felony, which defendant actually fired the fatal shots or whether defendants intended that the victim be killed. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

## § 14-32.1. Assaults on handicapped persons; punishments.

(a) For purposes of this section, a "handicapped person" is a person who has:

(1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or

(2) Infirmity

which would substantially impair that person's ability to defend himself.

(b) through (d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 31, effective October 1, 1994.

(e) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault or assault and battery on a handicapped person is guilty of a Class F felony. A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:

(1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or

(2) Inflicts serious injury or serious damage to a handicapped person; or

(3) Intends to kill a handicapped person.

(f) Any person who commits a simple assault or battery upon a handicapped person is guilty of a Class 1 misdemeanor. (1981, c. 780, s. 1; 1993, c. 539, ss. 15, 1139; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 31.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Effect of Amendments. —**

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, deleted former subsections (b), (c), and (d), regarding Class C and Class E felonies.

## § 14-32.2. Patient abuse and neglect; punishments.

(a) It shall be unlawful for any person to physically abuse a patient of a health care facility or a resident of a residential care facility, when the abuse is the result of an intentional or culpably negligent act or omission which causes serious bodily injury or death.

(b) Unless the conduct is prohibited by some other provision of law providing for greater punishment.

(1) Any person who violates subsection (a) above is guilty of a Class C felony where intentional conduct proximately causes the death of the patient or resident;

(2) Any person who violates subsection (a) above is guilty of a Class E felony where culpably negligent conduct proximately causes the death of the patient or resident;

(3) Any person who violates subsection (a) above is guilty of a Class F felony where such conduct proximately causes serious bodily injury to the patient or resident.

(c) "Health Care Facility" shall include hospitals, skilled nursing facilities, intermediate care facilities, intermediate care facilities for the mentally retarded, psychiatric facilities, rehabilitation facilities, kidney disease treatment centers, home health agencies, ambulatory surgical facilities, and any other health care related facility whether publicly or privately owned.

"Residential Care Facility" shall include adult care homes and any other residential care related facility whether publicly or privately owned.

(d) "Person" shall include any natural person, association, corporation, partnership, or other individual or entity.

(e) "Culpably negligent" shall mean conduct of a willful gross and flagrant character, evincing reckless disregard of human life.

(f) Any defense which may arise under G.S. 90-321(h) or G.S. 90-322(d) pursuant to compliance with Article 23 of Chapter 90 shall be fully applicable to any prosecution initiated under this section.

(g) Criminal process for a violation of this section may be issued only upon the request of a District Attorney.

(h) The provisions of this section shall not supersede any other applicable statutory or common law offenses. (1987, c. 527, s. 1; 1993, c. 539, s. 1140; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 535, s. 1.)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

**Effect of Amendments. —** The 1995 amendment, effective October 1, 1995, in subsection (c) in the second paragraph substituted "adult care homes" for "homes for the aged and disabled, family care homes, group homes for developmentally disabled adults, adult foster care homes".

## § 14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.

(a) Abuse. — A person is guilty of abuse if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, with malice aforethought, knowingly and willfully: (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the disabled or elder adult in a place or under a condition that is cruel or unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the abuse, the caretaker is guilty of a Class F felony. If the disabled or elder adult suffers injury from the abuse, the caretaker is guilty of a Class H felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(b) Neglect. — A person is guilty of neglect if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, wantonly, recklessly, or with gross carelessness: (i) fails to provide medical or hygienic care, or (ii) confines or restrains the disabled or elder adult in a place or under a condition that is unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony. If the disabled or elder adult suffers injury from the neglect, the caretaker is guilty of a Class I felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(c) Exploitation. — A person is guilty of exploitation if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting, and knowingly, willfully and with the intent to permanently deprive the owner of property or money: (i) makes a false representation, (ii) abuses a position of trust or fiduciary duty, or (iii) coerces, commands, or threatens, and, as a result of the act, the disabled or elder adult gives or loses possession and control of property or money.

If the loss of property or money is of a value of more than one thousand dollars ($1,000) the caretaker is guilty of a Class H felony. If the loss of property or money is of a value of less than one thousand dollars ($1,000) the caretaker is guilty of a Class 1 misdemeanor.

(d) Definitions. — The following definitions apply in this section:

(1) Caretaker. — A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.

(2) Disabled adult. — A person 18 years of age or older or a lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).
(3) Domestic setting. — Residence in any residential setting except for a health care facility or residential care facility as these terms are defined in G.S. 14-32.2.
(4) Elder adult. — A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being. (1995, c. 246, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 246, c. 2 provides that this section is effective December 1, 1995, and applies to offenses committed on or after that date.

## § 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:

(1) through (3) Repealed by Session Laws 1995, c. 507, s. 19.5(b), effective December 1, 1995;
(4) through (7) Repealed by Session Laws 1991, c. 525, s. 1;
(8) Repealed by Session Laws 1995, c. 507, s. 19.5(b), effective December 1, 1995;
(9) Commits an assault and battery against a sports official when the sports official is discharging or attempting to discharge official duties at a sports event, or immediately after the sports event at which the sports official discharged official duties. A "sports official" is a person at a sports event who enforces the rules of the event, such as an umpire or referee, or a person who supervises the participants, such as a coach. A "sports event" includes any interscholastic or intramural athletic activity in a primary, middle, junior high, or high school, college, or university, any organized athletic activity sponsored by a community, business, or nonprofit organization, any athletic activity that is a professional or semiprofessional event, and any other organized athletic activity in the State.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(1) Inflicts serious injury upon another person or uses a deadly weapon;
(2) Assaults a female, he being a male person at least 18 years of age;

(3) Assaults a child under the age of 12 years;

(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties; or

(5) Assaults a school bus driver, school bus monitor, or school employee who is boarding the school bus or who is on the school bus. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620, 1911, c. 193; C.S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2; 1973, c. 229, s. 4; c. 1413; 1979, cc. 524, 656; 1981, c. 180; 1983, c. 175, ss. 6, 10; c. 720, s. 4; 1985, c. 321; 1991, c. 525, s. 1; 1993, c. 286, s. 1; c. 539, s. 16; 1994, Ex. Sess., c. 14, s. 3; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 687, s. 1; 1995, c. 507, s. 19.5(b).)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 352, s. 1, added a subdivision (b)(10), effective December 1, 1995. That subdivision (b)(10) was deleted by Session Laws 1995, c. 507, s. 19.5(b), effective December 1, 1995.

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1993, c. 539, s. 16, effective October 1, 1994, and applicable to offenses occurring on or after that date, in subsection (a) substituted "Class 1 misdemeanor" for "misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days"; and in the introductory language of subsection (b) inserted "Class 1" preceding "misdemeanor" and deleted "punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment" following "misdemeanor".

The 1994 Extra Session amendment by c. 14, s. 3, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, deleted "or" from the end of subdivisions (b)(1), (b)(2), and (b)(3); substituted "s. 1;" for "s. 1." at the end of the paragraph containing subdivisions (b)(4) through (b)(7); and substituted "duties; or" for "duties." at the end of subdivision (b)(8).

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 17C or Chapter 116 of the General Statutes" in subdivision (b)(8).

Session Laws 1995, c. 352, s. 1, effective December 1, 1995, and applicable to offenses committed on or after that date, added a new subdivision (b)(10). See now subdivision (c)(5).

Session Laws 1995, c. 507, s. 19.5(b), effective December 1, 1995, and applicable to offenses committed on or after that date, in this section as amended by Session Laws 1995, c. 352, s. 1, substituted "2" for "1" following "Class" in subsection (a); in subsection (b) deleted subdivisions (b)(1) through (b)(3), regarding the actions described in subdivisions (c)(1) through (c)(3), deleted subdivision (b)(8), regarding assaults on officers or employees of the state, and company police or campus police officers, and deleted subdivision (b)(10), which would have been added by c. 352 effective December 1, 1995, regarding the actions described in subdivision (c)(5); and added subsection (c).

### CASE NOTES

I. General Consideration.

**I. GENERAL CONSIDERATION.**

**Definitions of Assault Necessary.** — Because a definition of assault was necessary for the jury to reach a verdict on the charge of assault on a law enforcement officer, the omission of the definition of assault in the jury instructions was prejudicial error. State v. Lineberger, 115 N.C. App. 687, 446 S.E.2d 375 (1994).

**Quoted** in State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993).

**Stated** in Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993).

**Cited** in In re Kenyon N., 110 N.C. App. 294, 429 S.E.2d 447 (1993); State v. Moore, 111 N.C. App. 649, 432 S.E.2d 887 (1993); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993); Providence Wash. Ins. Co. v. Locklear ex rel. Smith, 115 N.C. App. 490, 445 S.E.2d 418 (1994); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995).

## § 14-33.2. Habitual misdemeanor assault.

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony. (1995, c. 507, s. 19.5(c).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1995, c. 507, s. 19.5(q), provides that this section is effective December 1, 1995, and is applicable to offenses committed on or after that date.

## § 14-34. Assaulting by pointing gun.

If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor. (1889, c. 527; Rev., s. 3622; C.S., s. 4216; 1969, c. 618, s. 2½; 1993, c. 539, s. 17; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(d).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, substituted "Class A1 misdemeanor" for "Class 1 misdemeanor".

## § 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

Any person who willfully or wantonly discharges or attempts to discharge:

(1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or

(2) A firearm

into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony. (1969, c. 341; c. 869, s. 7; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 755; 1993, c. 539, s. 1141; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — The section above has been set out to correct a printing error.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**General Intent Crime — Intoxication No Defense.** — Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform the act because it is a general intent crime. Since intoxication does not negate a general intent, it was not necessary for the court to charge on intent or intoxication as a defense. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994).

**Assault with Deadly Weapon Distinguished.** —

Discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes, and defendant was properly convicted of, and punished for, both offenses. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

**Indictment.** —

Although the three shots fired by defendant into victim's vehicle occurred at different times and at different ranges, the indictments did not allege the specific events of each shot, in fact, the indictments for each shot were identically worded; therefore each shot could not be treated as grounds for separate convictions. State v. Rambert, 116 N.C. App. 80, 446 S.E.2d 599, cert. granted, 338 N.C. 313, 450 S.E.2d 489 (1994).

**Stated** in State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993).

**Cited** in State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995).

## § 14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.

Unless a person's conduct is covered under some other provision of law providing greater punishment, any person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State, a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 17C or Chapter 116 of the

General Statutes, in the performance of his duties shall be guilty of a Class F felony. (1969, c. 1134; 1977, c. 829; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1981, c. 535, s. 1; 1991, c. 525, s. 2; 1993, c. 539, s. 1142; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 687, s. 2; 1995, c. 507, s. 19.5(i).)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments. —**

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "company police officers, or campus police officers" in the catchline of this section, and inserted "a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 17C or Chapter 116 of the General Statutes."

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, added "Unless a person's conduct is covered under some other provision of law providing greater punishment" to the beginning of the section.

CASE NOTES

**Cited** in State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993).

## § 14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-34.5. Assault with a firearm on a law enforcement officer.

Any person who commits an assault with a firearm upon a law enforcement officer in the performance of his or her duties is guilty of a Class E felony. (1995, c. 507, s. 19.5(j).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1995, c. 507, s. 19.5(q), provides that this section is effective December 1, 1995, and is applicable to offenses committed on or after that date.

## § 14-34.6. Assault or affray on an emergency medical technician, ambulance attendant, emergency department nurse, or emergency department physician.

(a) A person is guilty of a Class A1 misdemeanor if the person commits an assault or an affray on an emergency medical technician, ambulance attendant, emergency department nurse, or emergency department physician while the technician, attendant, nurse, or physician is discharging or attempting to discharge official duties.

(b) Unless a person's conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class I felony if the person violates subsection (a) of this section and (i) inflicts bodily injury or (ii) uses a deadly weapon other than a firearm.

(c) Unless a person's conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person violates subsection (a) of this section and uses a firearm. (1995, c. 507, s. 19.6(a).)

**Editor's Note.** — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 507, s. 19.6(a) having been 14-34.5.

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1995, c. 507, s. 19.6(b), provides that this section is effective December 1, 1995, and is applicable to offenses committed on or after that date.

## ARTICLE 9.

## *Hazing.*

## § 14-35. Hazing; definition and punishment.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-36. Expulsion from school; duty of faculty to expel.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 10.

## *Kidnapping and Abduction.*

### § 14-39. Kidnapping.

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 746, s. 2; 1993, c. 539, s. 1143; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 509, s. 8.)

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —**
The 1995 amendment, effective July 29, 1995, added "or" at the end of subdivision (a)(3) and made a related punctuation change.

#### CASE NOTES

I. General Consideration.
II. Kidnapping, Generally.
VII. Second-Degree Kidnapping.
  A. In General.
IX. Instructions.

### I. GENERAL CONSIDERATION.

**Applied** in State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, — U.S. —, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994).

**Cited** in State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993); Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489 (1993).

### II. KIDNAPPING, GENERALLY.

**Restraint Must Be Separate and Apart from That Inherent in Committing Other Felonies. —** The restraint element necessary for the charge of kidnapping is separate and distinct from the elements necessary to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. State v. Carrillo, 115 N.C. App. 674, 446 S.E.2d 379 (1994).

**Evidence held sufficient, etc. —** Substantial evidence found that the victim-infant was unlawfully confined, restrained and removed within the meaning of this section. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

**Evidence Held Insufficient. —** The removal of a clerk from the part of a convenience store where the money was kept to some other location was sufficient to support the charge of kidnapping. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

Removal of a victim from one location to another prior to murdering her supported a charge of kidnapping. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

### VII. SECOND-DEGREE KIDNAPPING.

#### A. In General.

**The crime of second-degree kidnapping was complete,** irrespective of the fact that defendant went on to commit the crime of first degree rape, where, defendant forced the victim into the store restroom, tied her hands with cable, and thus procured her submission and restrained her within the meaning of this section with the purpose of committing rape. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

**Sufficient Evidence. —** All of the elements for second-degree kidnapping were met. State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993).

Where the evidence showed that, after shooting victim, a pawnshop clerk, defendant pointed his gun at victim's girlfriend and ordered her to get down on the floor and crawl towards back room, conviction of second-degree kidnapping for the purpose of terrorizing would be upheld. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

### IX. INSTRUCTIONS.

**Instruction on False Imprisonment as Lesser Offense. —** Where the evidence indicated that defendant confined, restrained, and removed the victim in order to terrorize and sexually assault her and there was no evidence indicating that defendant acted for any other purpose, the trial court did not err in failing to instruct on the lesser-included offense of false imprisonment. State v. Claypoole, 118 N.C. App. 714, 457 S.E.2d 322 (1995).

## § 14-40. Enticing minors out of the State for the purpose of employment.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-41. Abduction of children.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-42: Repealed by Session Laws 1993, c. 539, s. 1358.2, effective October 1, 1994.

**Cross References.** — For structured sentencing provisions effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 539, s. 1358.2 repeals this section effective October 1, 1994. Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-43: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 29(2), effective October 1, 1994.

**Cross References.** — For structured sentencing provisions effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 539, s. 1145, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), would have amended this section, effective October 1, 1994.

## § 14-43.1. Unlawful arrest by officers from other states.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-43.2. Involuntary servitude.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-43.3. Felonious restraint.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 11.

## *Abortion and Kindred Offenses.*

### § 14-45.1. When abortion not unlawful.

**CASE NOTES**

**Cited** in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

### § 14-46. Concealing birth of child.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 12.

## *Libel and Slander.*

### § 14-47. Communicating libelous matter to newspapers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 13.

## *Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.*

### § 14-49. Malicious use of explosive or incendiary; punishment.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; punishment.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-50: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(4), effective October 1, 1994.

**Cross References.** — For structured sentencing provisions effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

## Article 14.

## *Burglary and Other Housebreakings.*

## § 14-51. First and second degree burglary.

### CASE NOTES

I. General Consideration.
II. Elements of Offense.
  B. First Degree.
IV. Dwelling House or Sleeping Apartment.
X. Evidence.
XI. Instructions.

### I. GENERAL CONSIDERATION.

**Cited** in State v. Owen, 111 N.C. App. 300, 432 S.E.2d 378 (1993); State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Scales, 114 N.C. App. 735, 443 S.E.2d 124, cert. denied, 337 N.C. 805, 449 S.E.2d 755 (1994).

### II. ELEMENTS OF OFFENSE.

### B. First Degree.

**Evidence Held Insufficient.** — Where a breaking and entering could have occurred any time before the sun rose, the evidence was only sufficient to raise a "suspicion or conjecture" that the breaking and entering occurred at nighttime, and the state failed to produce evidence of one element of first-degree burglary, entitling defendant to have the charge of burglary against him dismissed. However, the jury, in convicting defendant of first-degree burglary, necessarily found facts which established felonious breaking and entering. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

### IV. DWELLING HOUSE OR SLEEPING APARTMENT.

**An uninhabited, unoccupied residential condominium unit, available for rent,** is a "dwelling house or sleeping apartment" as those terms are used in the definition of burglary. State v. Hobgood, 112 N.C. App. 262, 434 S.E.2d 881 (1993).

### X. EVIDENCE.

**Evidence Was Sufficient to Deny Motion to Dismiss. —**

In view of uncontroverted evidence presented by homeowner that the dwelling in question was occupied at the time defendant entered, it was not error for the trial court to deny his motion to dismiss the charge of first degree burglary on ground that state had failed to prove this. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

### XI. INSTRUCTIONS.

**Charge of Misdemeanor Breaking and Entering Not Required. —**

Where overwhelming evidence showed that prior to breaking into the house defendant had decided to kill his estranged wife's family, all the evidence relevant to the time before defendant broke and entered supported an inference that defendant possessed the intent to kill, and no evidence tended to negate this intent, a rational trier of fact could not have concluded defendant did not possess the intent to commit murder, and the trial court did not err in refusing to instruct on the lesser-included offense of misdeameanor breaking or entering. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Evidence of intoxication was insufficient to require an instruction on misdemeanor breaking and entering where the only evidence of defendant's intoxication was the testimony defendant was an alcoholic, defendant's testimony that he had been drinking on the dates in question, and the fact that the police, on a later date, found beer in his car. State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (1994).

**Error Not to Instruct on Misdemeanor Breaking and Entering. —** The trial court erred in not instructing the jury on the lesser-included offense of misdemeanor breaking or entering and the error was not cured by the guilty verdict of first-degree burglary since it cannot be known whether the jury would have convicted defendant of misdemeanor breaking or entering had it been properly instructed. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

**Instructions as to Lesser Offense Not Supported by Evidence. —** Ample evidence from which the jury could infer that defendant entered the victim's house with the intent to commit rape and to commit other offenses against the victims did not conflict with evidence that he intended to commit rape, but was irrelevant for purposes of proof of burglary and of felony murder. Therefore, the State's evidence was positive as to each element of burglary based on the intent to commit rape, and no evidence contradicted any element of this charge. Thus, the trial court did not err in refusing to submit the lesser-included offenses of second-degree murder and involuntary manslaughter to the jury. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Failure to instruct on the lesser-included offense of misdemeanor breaking or entering was not error where there was no evidence to support the lesser charge. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

**Instruction That Verdict of Burglary in Second Degree Not Permissible. —**

Where all of the evidence presented showed the dwelling was occupied at the time of the breaking and entering, the court was not authorized to instruct the jury it could return a verdict of burglary in the second degree. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

## § 14-51.1. Use of deadly physical force against an intruder.

(a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.

(b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

(c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law. (1993 (Reg. Sess., 1994), c. 673, s. 1.)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 673, s. 2, made this section effective October 1, 1994, and applicable to offenses committed on or after that date.

## § 14-52. Punishment for burglary.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-54. Breaking or entering buildings generally.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

I. General Consideration.
IX. Trial.
  C. Instructions.

### I. GENERAL CONSIDERATION.

**Cited** in State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993); State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (1993); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

### IX. TRIAL.

#### C. Instructions.

**Charge on Lesser Offense Not Required Absent Evidence Thereof.** — Where overwhelming evidence showed that prior to breaking into the house defendant had decided to kill his estranged wife's family, all the evidence relevant to the time before defendant broke and entered supported an inference that defendant possessed the intent to kill, and no evidence tended to negate this intent, a rational trier of fact could not have concluded defendant did not possess the intent to commit murder, and the trial court did not err in refusing to instruct on the lesser included offense of misdeameanor breaking or entering. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, — U.S. —, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

## § 14-55. Preparation to commit burglary or other housebreakings.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

II. Possession of Housebreaking Implements.
  B. Implements.

### II. POSSESSION OF HOUSE-BREAKING IMPLEMENTS.

### B. Implements.

**Screwdrivers and Icepicks May Be Implements of Housebreaking.** — Although the tools possessed by defendant were capable of legitimate use, under the circumstances shown by the State, a legitimate inference could be drawn that defendant possessed the screwdriver and icepick for the purpose of breaking into the building, so as to come within the proscription of this section as "other implements of housebreaking." State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

## § 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Cited** in State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993).

## § 14-56.2. Damaging or destroying coin- or currency-operated machines.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-56.3. Breaking into paper currency machines.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-57. Burglary with explosives.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 15.

## *Arson and Other Burnings.*

## § 14-58. Punishment for arson.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Second-Degree Arson — Elements.** — Combining the definitions found in the common law definition of arson and those found in this section, the court found the elements of second-degree arson to be: (1) the malicious and willful (2) burning of a structure; (3) which is the dwelling house of another; and (4) which is unoccupied at the time of the burning. State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

**Sufficiency of Indictment. —**

Even though the statutory reference was incorrect, the body of the indictment was sufficient to properly charge defendant with the burning of a mobile home. State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

**Validity of Trial Upheld.** — Although indictments charging attempted first-degree arson recited that the charges were brought pursuant to this section, they actually charged a violation of § 14-67 which prohibits attempted arson; this mistake in the citation of the statute did not affect the validity of the trial. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, — U.S. —, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

## § 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

CASE NOTES

**Cited** in State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

## § 14-59. Burning of certain public buildings.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

**Construction with Other Statutes.** — The burning of personal property in violation of § 14-66 was not a lesser included offense of burning a public building in violation of this section. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

## § 14-60. Burning of schoolhouses or buildings of educational institutions.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-61. Burning of certain bridges and buildings.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-62. Burning of churches and certain other buildings.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-62.1. Burning of building or structure in process of construction.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-66. Burning of personal property.

### CASE NOTES

**Construction with Other Statutes.** — The burning of personal property in violation of this section was not a lesser included offense of burning a public building in violation of § 14-59. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

## § 14-67: Repealed by Session Laws 1993, c. 539, s. 1358.2, effective October 1, 1994.

**Cross References.** — For structured sentencing provisions effective October 1, 1994, see § 15A-1340.10 et seq.

**Editor's Note.** — Session Laws 1993, c. 539, s. 1358.2 repeals this section effective October 1, 1994. Section 1359 of Session Laws 1993, c. 539, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses occurring before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-67.1. Burning other buildings.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Validity of Trial Not Affected by Improper Statutory Reference.** — Although indictments charging attempted first-degree arson recited that the charges were brought pursuant to § 14-58, they actually charged a violation of this section which prohibits attempted arson; this mistake in the citation of the statute did not affect the validity of the trial. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223, cert. denied, — U.S. —, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

## § 14-68. Failure of owner of property to comply with orders of public authorities.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-69. Failure of officers to investigate incendiary fires.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-69.1. Making a false report concerning destructive device.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-69.2. Perpetrating hoax by use of false bomb or other device.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

## Article 16.

## *Larceny.*

## § 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 24, s. 45 provides for the Department of Correction, the Department of Crime Control and Public Safety, and the Department of Justice to study the effect on the criminal justice system of having the sentence of life imprisonment without parole for certain criminal offenses and to consider whether the sentence has served as a deterrent with regard to those crimes for which it may be imposed, other impacts the sentence may have had on the crime rate, its fiscal impact on the State's finances, and projected costs if the sentence continues to be imposed. The findings and recommendations are to be reported by January 1, 2005.

Session Laws 1994, Extra Session, c. 24, s. 70, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1993-95 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1993-95 biennium."

### CASE NOTES

I. General Consideration.
III. Practice and Procedure.

#### I. GENERAL CONSIDERATION.

**Applied** in State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993).

#### III. PRACTICE AND PROCEDURE.

**Conviction for Larceny, Receiving and Possession of Same Property.** — Where defendant was convicted of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses, and the trial court erred in failing to arrest judgment for defendant's conviction of felonious possession of stolen goods. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

## § 14-71. Receiving stolen goods.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-71.1. Possessing stolen goods.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Cited** in State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

## § 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

(a) Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars ($1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or
(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or
(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.
(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.
(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

(d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C.S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4; 1977, c. 978, ss. 2, 3; 1979, c. 408, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 11, 47; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 523, s. 2; 1993, c. 539, s. 34; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 185, s. 2.)

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —**

The 1995 amendment, effective December 1, 1995, and applicable to acts committed on or after that date, added subsection (d).

## CASE NOTES

- I. General Consideration.
- II. Larceny.
  - A. In General.
- VIII. Practice and Procedure.
  - E. Instructions.

### I. GENERAL CONSIDERATION.

**Cited** in State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994).

### II. LARCENY.

#### A. In General.

**Knowing the Identity of Owner. —** Taking money with intent to deprive the owner when the identity of the owner is known constitutes misdemeanor larceny. Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994).

Where police officer saw victim drop money, saw detainee pick it up and keep it and it appeared to officer that detainee knew the identity of the owner of the money when he took it, officer had ample reason to believe that detainee was committing the crime of misdemeanor larceny. Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994).

### VIII. PRACTICE AND PROCEDURE.

#### E. Instructions.

**Refusal to Instruct on Misdemeanor Larceny Upheld. —** The trial court properly refused to give a requested instruction on the lesser charge of misdemeanor larceny because the only evidence of value indicated that the truck stolen was worth more than the threshold amount and there was no evidence which would have supported a jury verdict of misdemeanor larceny. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

## § 14-72.1. Concealment of merchandise in mercantile establishments.

(a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e). Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

(b) Repealed by Session Laws 1985 (Regular Session, 1986), c. 841, s. 2, effective October 1, 1986.

(c) A merchant, or the merchant's agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, or the merchant's agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or the merchant's agent or employee, is a minor under the age of 18 years, the merchant or the merchant's agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, or the merchant's agent or employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor.

(d) Whoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e).

Nothing herein shall be construed to provide that the mere possession of goods or the production by shoppers of improperly priced merchandise for checkout shall constitute prima facie evidence of guilt.

(e) Punishment. — For a first conviction under subsection (a) or (d), or for a subsequent conviction for which the punishment is not specified by this subsection, the defendant may be guilty of a Class 3 misdemeanor. The term of imprisonment may be suspended only on condition that the defendant perform community service for a term of at least 24 hours. For a second offense committed within three years after the date the defendant was convicted of an offense under this section, the defendant may be guilty of a Class 2 misdemeanor. The term of imprisonment may be suspended only on condition that the defendant be imprisoned for a term of at least 72 hours as a condition of special probation, perform community service for a term of at least 72 hours, or both. For a third or subsequent offense committed within five years after the date the defendant was convicted of two other offenses under this section, the defendant may be guilty of a Class 1 misdemeanor. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 14 days. However, if the sentencing judge finds that the defendant is unable, by reason of mental or physical infirmity, to perform the service required under this section, and the reasons for such findings are set forth in the judgment, he may pronounce such other sentence as he finds appropriate.

(f) Community Service Period. — If the judgment requires a defendant sentenced under this section to perform a specified number of hours of community service, the community service must be completed within:

(1) 90 days, if the amount of community service required is 72 hours or more;
(2) 60 days, if the amount of community service required is at least 48 hours but less than 72 hours; and
(3) 30 days, if the amount of community service required is at least 24 hours but less than 48 hours.

The court may extend these time limits upon motion of the defendant if it finds that the defendant has made a good faith effort to comply with the time limits specified in this subsection. Failure to complete the community service requirement within the applicable time limits is a violation of the defendant's probation.

(g) Limitations. — For active terms of imprisonment imposed under this section:

(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial;
(2) The defendant must serve the mandatory minimum period of imprisonment and good or gain time credit may not be used to reduce that mandatory minimum period; and
(3) The defendant may not be released or paroled unless he is otherwise eligible and has served the mandatory minimum period of imprisonment. (1957, c. 301; 1971, c. 238; 1973, c. 457, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 841, ss. 1-3; 1987, c. 660; 1993, c. 539, s. 35; 1994, Ex. Sess., c. 24, s. 14(c); c. 28, s. 1; 1995, c. 185, s. 3; c. 509, s. 9.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1994 Extra Session amendment by c. 28, s. 1, effective January 1, 1995, and applicable to offenses occurring on or after that date, in subsection (c) substituted "the merchant's" for "his" throughout the subsection, substituted "minor under the age of 18 years" for "minor 16 years of age or younger," and added the last sentence of the subsection.

Session Laws 1995, c. 185, s. 3, effective December 1, 1995, and applicable to acts committed on or after that date, in subsection (c), in the first sentence inserted "upon the premises of the store or in a reasonable proximity thereto, is" following "detention is", and inserted "and" following "length of time".

Session Laws 1995, c. 509, s. 9, effective July 29, 1995, substituted "subsection" for "subsections" in the first sentence of subsection (e).

CASE NOTES

**No Protection from Claims of Assault and Battery.** — Subsection (c) gives police officers, merchants, their employees and their agents the authority to detain or cause the arrest of persons suspected of shoplifting on the merchant's premises and protects them from civil liability for detention, malicious prosecution, false imprisonment, or false arrest; however, actions for assault and battery are conspicuously omitted from the statute. Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994).

**Pat Down Searches Not Permitted.** — Subsection (c) does not give police officers or merchants the right to conduct "pat down" searches of customers without their counsel. Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994).

**Applied** in Mullins v. Friend, 116 N.C. App. 676, 449 S.E.2d 227 (1994).

## § 14-72.2. Unauthorized use of a motor-propelled conveyance.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-72.3. Removal of shopping cart from shopping premises.

(a) As used in this section:

(1) "Shopping cart" means the type of push cart commonly provided by grocery stores, drugstores, and other retail stores for customers to transport commodities within the store and from the store to their motor vehicles outside the store.

(2) "Premises" includes the motor vehicle parking area set aside for customers of the store.

(b) It is unlawful for any person to remove a shopping cart from the premises of a store without the consent, given at the time of the removal, of the store owner, manager, agent or employee.

(c) Violation of this section is a Class 3 misdemeanor. (1983, c. 705, s. 1; 1994, Ex. Sess., c. 14, s. 3.1.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 3 misdemeanor" for "misdemeanor punishable by a fine of not more than one hundred dollars ($100.00), imprisonment for not more than thirty days, or both" in subsection (c).

## § 14-72.4. Unauthorized taking or sale of labeled dairy milk cases or milk crates bearing the name or label of owner.

(a) A person is guilty of the unauthorized taking or sale of a dairy milk case or milk crate on or after January 1, 1990, if he:

(1) Takes, buys, sells or disposes of any dairy milk case or milk crate, bearing the name or label of the owner, without the express or implied consent of the owner or his designated agent; or

(2) Refuses upon demand of the owner or his designated agent to return to the owner or his designated agent any dairy milk case or milk crate, bearing the name or label of the owner; or

(3) Defaces, obliterates, erases, covers up, or otherwise removes or conceals any name, label, registered trademark, insignia, or other business identification of an owner of a dairy milk case or milk crate, for the purpose of destroying or removing from the milk case or milk crate evidence of its ownership.

(b) For purposes of this section dairy milk cases or milk crates shall be deemed to bear a name or label of an owner when there is imprinted or attached on the case or crate a name, insignia, mark, business identification or label showing ownership or sufficient information to ascertain ownership. For purposes of this section, the term "dairy case" shall be defined as a wire or plastic container which holds 16 quarts or more of beverage and is used by distributors or retailers, or their agents, as a means to transport, store, or carry dairy products.

(c) A violation of this section is a Class 2 misdemeanor.

(d) Nothing in this section shall preclude the prosecution of any misdemeanor or felony offense that is applicable under any other statute or common law. (1989, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 3.2.)

**Editor's Note.** —
Session Laws 1994, Extra Session, c.14, s.73, provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor punishable by a fine not to exceed three hundred dollars ($300.00), imprisonment not to exceed six months, or both, in the discretion of the court" in subsection (c).

## § 14-75. Larceny of chose in action.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-76. Larceny, mutilation, or destruction of public records and papers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-77. Larceny, concealment or destruction of wills.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-78. Larceny of ungathered crops.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-78.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(1), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-79. Larceny of ginseng.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-80: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(2), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-81. Larceny of horses, mules, swine, cattle, or dogs.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-82. Taking horses, mules, or dogs for temporary purposes.

If any person shall unlawfully take and carry away any horse, gelding, mare, mule, or dog, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a Class 2 misdemeanor. (1879, c. 234, s. 1; Code, s. 1067; Rev., s. 3509; 1913, c. 11; C.S., s. 4261; 1969, c. 1224, s. 3; 1989, c. 773, s. 3; 1994, Ex. Sess., c. 14, s. 3.3.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date substituted "Class 2 misdemeanor" for "misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

## § 14-85. Pursuing or injuring livestock with intent to steal.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-86: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(3), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 17.

## *Robbery.*

## § 14-87. Robbery with firearms or other dangerous weapons.

**Editor's Note.** —

Session Laws 1993, c. 539, s. 1173 repeals subsection (d) of this section effective October 1, 1994. Section 1359 of Session Laws 1993, c. 539, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

I. General Consideration.
III. Armed Robbery.
V. Use or Threatened Use of Dangerous Weapon.
  A. In General.
  B. Dangerous Weapon.
IX. Evidence.
X. Instructions.

### I. GENERAL CONSIDERATION.

**Cited** in United States v. Fonville, 5 F.3d 781 (4th Cir. 1993); State v. Capps, 114 N.C. App. 156, 441 S.E.2d 621 (1994); State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994); State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437, cert. denied, 338 N.C. 523, 452 S.E.2d 823 (1994).

### III. ARMED ROBBERY.

**Adjudication of a Juvenile** — Where the State's evidence showed more than "mere possession" of the weapon, the gun was fired into the air shortly before the juvenile demanded candy, the juvenile deliberately gestured toward the gun in his pocket while demanding the candy, and the victim was scared that if he did not comply, the juvenile might shoot him, the trial court did not err in denying the juvenile's motion to dismiss and adjudicating him delinquent on the armed robbery charge. In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (1995).

## V. USE OR THREATENED USE OF DANGEROUS WEAPON.

### A. In General.

**Intent to Harm Not Required.** — This section does not require the State to prove that defendant intended to cut the victim, it requires only a showing that defendant used or threatened to use a dangerous weapon or implement and posed a danger or threat to the life of the victim. State v. Harris, 115 N.C. App. 560, 445 S.E.2d 626 (1994).

### B. Dangerous Weapon.

**Pellet Gun.** —

A pellet gun may be a dangerous weapon per se, or at a minimum, such a determination must be made upon a consideration of the instrument's use. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Where defendant placed a pellet gun into the clerk's back, pointed directly at her kidney, the evidence showed the projectile from such a pistol was capable of totally penetrating a quarter-inch of plywood, and, thus, very likely would have resulted in a life-threatening injury to the clerk had defendant fired the weapon. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**Broken Bottle.** — Where defendant held a broken bottleneck to victim's face and lip and threatened to cut her badly, the defendant's use of the broken bottleneck constituted a dangerous weapon. State v. Harris, 115 N.C. App. 560, 445 S.E.2d 626 (1994).

## IX. EVIDENCE.

**Evidence of Demand Not Necessary.** — Evidence that defendants drew their pistols, and one defendant told victim, "Buddy, don't even try it," held sufficient to show attempted armed robbery, even without a demand for money or property. State v. Davis, 340 N.C. 1, 455 S.E.2d 627 (1995).

**Evidence held sufficient to be submitted to the jury, etc.** —

The evidence was sufficient to support a finding by the jury that defendant was guilty of conspiracy to commit armed robbery and attempted armed robbery. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994).

**Evidence of Taking Sufficient.** — Although the state did not introduce the money found on defendant's person, there was substantial evidence that defendant and his accomplices unlawfully took the victim's personal property. State v. Donnell, 117 N.C. App. 184, 450 S.E.2d 533 (1994).

**Evidence held sufficient to sustain conviction, etc.,**

Substantial evidence existed in the record to support the trial court's submission of the case against defendant for robbery with a dangerous weapon to the jury even though no physical evidence was found. State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993).

Where there was evidence that defendant was in possession of money apparently belonging to the victim at the time witness and other defendant entered the victim's home and where there was also evidence that defendant was in possession of a gun at that time, there was sufficient evidence to support defendant's conviction for robbery with a dangerous weapon. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

Evidence was clearly sufficient to show that defendant robbed victim with the use of a dangerous weapon. State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993).

## X. INSTRUCTIONS.

**Definition of Dangerous Weapon.** — Although the court omitted the word "death" from the instruction defining dangerous weapon, the trial court's instruction as to the definition of serious bodily injury was appropriate to aid the jury in determining if the instrument was likely to cause death or serious bodily injury, and, therefore, to endanger or threaten life. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

**Failure to Instruct on Common-Law Robbery Not Error.** — The trial court did not err in denying request for an instruction on common-law robbery where state's evidence included use of pry bar, screwdriver, and lug wrench carried into the trailer by the assailants. State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994).

**Instruction on Right Not to Retreat.** — Defendant was entitled to a jury instruction relating the defendant's right not to retreat where the evidence revealed that defendant did not stab the victim until after trying to leave the house on two occasions and after the victim tried to choke her. State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994), cert. denied, 339 N.C. 616, 454 S.E.2d 259 (1995).

## § 14-87.1. Punishment for common-law robbery.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Defendant Properly Required to Speak Words of Robber.** — Notwithstanding the fact that the witness stated that she did not need to hear defendant speak in order to identify him, the trial court correctly requested and required defendant to speak the words the robber spoke to demonstrate his voice to the witness and to the jury for purposes of voice identification. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

**Cited** in United States v. Fonville, 5 F.3d 781 (4th Cir. 1993).

## § 14-88. Train robbery.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-89: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(5), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-89.1. Safecracking.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 18.

## *Embezzlement.*

### § 14-90. Embezzlement of property received by virtue of office or employment.

**CASE NOTES**

IV. Indictment.

**IV. INDICTMENT.**

**Substantial Alteration Prohibited.** — Deletion by trial court of the words, "Mike Frost, president" from indictments charging defendant with embezzlement to change ownership from Mike Frost, an individual, to Petroleum World, Inc., a corporation, was a substantial alteration of the indictment prohibited by § 15A-923(e). State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

### § 14-92. Embezzlement of funds by public officers and trustees.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-93. Embezzlement by treasurers of charitable and religious organizations.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-95: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(6), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-97. Appropriation of partnership funds by partner to personal use.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-99. Embezzlement of taxes by officers.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 19.

## *False Pretenses and Cheats.*

## § 14-100. Obtaining property by false pretenses.

### CASE NOTES

I. General Consideration.
IV. Illustrative Cases.

### I. GENERAL CONSIDERATION.

**Applied** in State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993).

### IV. ILLUSTRATIVE CASES.

**Jury Instruction Failed to Allege Exact Misrepresentation Upheld.** — Where the State's evidence showed that defendant obtained property (the victims' money) by false pretenses (the statements that defendant was a "broker" or "licensed broker" and that their money would be invested in stock options), even though the instruction on obtaining property by false pretenses failed to mention the exact misrepresentation alleged in the indictment, there was no fatal variance between the indictment, the proof presented at trial, and the instructions given to the jury. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

## § 14-101. Obtaining signatures by false pretenses.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-102. Obtaining property by false representation of pedigree of animals.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-103. Obtaining certificate of registration of animals by false representation.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-104. Obtaining advances under promise to work and pay for same.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-105. Obtaining advances under written promise to pay therefor out of designated property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-106. Obtaining property in return for worthless check, draft or order.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-107. Worthless checks.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-110. Defrauding innkeeper or campground owner.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-111: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(4), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-111.1. Obtaining ambulance services without intending to pay therefor — Buncombe, Haywood and Madison Counties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a Class 2 misdemeanor. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

The section shall apply to Anson, Ashe, Beaufort, Caldwell, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Duplin, Forsyth, Gaston, Graham, Guilford, Haywood, Henderson, Hoke, Hyde, Iredell, Macon, Mecklenburg, Montgomery, Orange, Pasquotank, Person, Polk, Randolph, Robeson, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Washington, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144; 1983, c. 42, s. 1; 1985, c. 335, s. 1; 1987 (Reg. Sess., 1988), c. 910, s. 1; 1993, c. 539, s. 50; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, inserted Graham and Polk into the list of counties in the second paragraph.

## § 14-111.3. Making unneeded ambulance request in certain counties.

It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall be guilty of a Class 3 misdemeanor.

This section shall apply only to the Counties of Ashe, Buncombe, Cherokee, Clay, Cleveland, Davie, Duplin, Graham, Greene, Haywood, Hoke, Macon, Madison, Polk, Robeson, Washington, Wilkes and Yadkin. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96; 1983, c. 42, s. 2; 1985, c. 335, s. 2; 1987 (Reg. Sess., 1988), c. 910, s. 2; 1989, c. 514; 1989 (Reg. Sess., 1990), c. 834; 1993, c. 539, s. 51; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 3.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, inserted Graham and Polk into the list of counties in the second paragraph.

## § 14-112. Obtaining merchandise on approval.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-113. Obtaining money by false representation of physical defect.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 19A.

### *Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.*

## § 14-113.5. Making, distributing, possessing, transferring, or programming device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.

(a) It shall be unlawful for any person knowingly to:

(1) Make, distribute, possess, use, or assemble an unlawful telecommunications device or modify, alter, program, or

reprogram a telecommunication device designed, adapted, or which is used:

a. For commission of a theft of telecommunication service or to acquire or facilitate the acquisition of telecommunications service without the consent of the telecommunication service provider in violation of this Article, or

b. To conceal, or assist another to conceal, from any supplier of a telecommunication service provider or from any lawful authority the existence or place of origin or of destination of any telecommunication, or

(2) Sell, possess, distribute, give, transport, or otherwise transfer to another or offer or advertise for sale any:

a. Unlawful telecommunication device, or plans or instructions for making or assembling the same under circumstances evincing an intent to use or employ the unlawful telecommunication device, or to allow the same to be used or employed, for a purpose described in (1)a or (1)b above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling the unlawful telecommunication device; or

b. Material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture of an unlawful telecommunication device; or

(3) Publish plans or instructions for making or assembling or using any unlawful telecommunication device, or

(4) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have the telephone number, credit number, credit device or method of numbering or coding so used.

(5) Repealed by Session Laws 1995, c. 425, s. 1, effective December 1, 1995, and applicable to offenses committed on or after that date.

(b) Any unlawful telecommunication device, plans, instructions, or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section. Upon the conviction of a person for a violation of this section, the court may order the sheriff of the county in which the person was convicted to destroy as contraband or to otherwise lawfully dispose of the unlawful telecommunication device, plans, instructions, or publication.

(c) The following definitions apply in this section and in G.S. 14-113.6:

(1) Manufacture of an unlawful telecommunication device. — The production or assembly of an unlawful telecommunication device or the modification, alteration, programming

or reprogramming of a telecommunication device to be capable of acquiring or facilitating the acquisition of telecommunication service without the consent of the telecommunication service provider.

(2) Publish. — The communication or dissemination of information to any one or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book.

(3) Telecommunication device. — Any type of instrument, device, machine or equipment that is capable of transmitting or receiving telephonic, electronic or radio communications, or any part of such instrument, device, machine or equipment, or any computer circuit, computer chip, electronic mechanism or other component that is capable of facilitating the transmission or reception of telephonic, electronic or radio communications.

(4) Telecommunication service. — Any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images, sounds or intelligence of any nature of telephone, including cellular or other wireless telephones, wire, radio, electromagnetic, photoelectronic or photo-optical system.

(5) Telecommunication service provider. — A person or entity providing telecommunication service, including, a cellular, paging or other wireless communications company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or telecommunication service.

(6) Unlawful telecommunication device. — Any telecommunication device that is capable, or has been altered, modified, programmed or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable, of acquiring or facilitating the acquisition of any electronic serial number, mobile identification number, personal identification number or any telecommunication service without the consent of the telecommunication service provider. The term includes, telecommunications devices altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider and other instruments capable of disguising their identity or location or of gaining access to a communications system operated by a telecommunication service provider. This section shall not apply to any device operated by a law enforcement agency in the normal course of its activities. (1965, c. 1147; 1971, c. 1213, s. 2; 1995, c. 425, s. 1.)

**Effect of Amendments.** — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, substituted "distributing, possessing, transferring, or programming" for "possessing or transferring" in the catchline of this section, and rewrote the text of this section.

## § 14-113.6. Penalties for violation; civil action.

(a) Any person violating any of the provisions of this Article shall be guilty of a Class 2 misdemeanor. However, if the offense is a violation of G.S. 14-113.5 and involves five or more unlawful telecommunication devices the person shall be guilty of a Class G felony.

(b) The court may, in addition to any other sentence authorized by law, order a person convicted of violating G.S. 14-113.5 to make restitution for the offense.

(c) Any person or entity aggrieved by a violation of G.S. 14-113.5 may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, costs of suit and any attorney fees as may be provided by law. (1961, c. 223, s. 5; 1965, c. 1147; 1969, c. 1224, s. 6; 1993, c. 539, s. 54; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 425, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, rewrote the catchline of this section, which formerly read "Violation made misdemeanor", added the subsection (a) designation, added the last sentence of subsection (a), and added subsections (b) and (c).

## ARTICLE 19B.

## *Financial Transaction Card Crime Act.*

## § 14-113.17. Punishment and penalties.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 20.

## *Frauds.*

## § 14-114. Fraudulent disposal of personal property on which there is a security interest.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-115. Secreting property to hinder enforcement of lien or security interest.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-116: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(1), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-117. Fraudulent and deceptive advertising.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-117.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(5), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-117.2. Gasoline price advertisements.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118. Blackmailing.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118.1. Simulation of court process in connection with collection of claim, demand or account.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118.3. Acquisition and use of information obtained from patients in hospitals for fraudulent purposes.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118.4. Extortion.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-118.5. Theft of cable television service.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 21.

## *Forgery.*

## § 14-120. Uttering forged paper or instrument containing a forged endorsement.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-121. Selling of certain forged securities.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-122. Forgery of deeds, wills and certain other instruments.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-122.1. Falsifying documents issued by a secondary school, postsecondary educational institution, or governmental agency.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER VI. CRIMINAL TRESPASS.

## ARTICLE 22.

## *Damages and Other Offenses to Land and Fixtures.*

### § 14-127. Willful and wanton injury to real property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

#### CASE NOTES

**Cited** in State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993).

### § 14-128. Injury to trees, crops, lands, etc., of another.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-129. Taking, etc., of certain wild plants from land of another.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-130. Trespass on public lands.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-131. Trespass on land under option by the federal government.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-132. Disorderly conduct in and injuries to public buildings and facilities.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-132.2. Willfully trespassing upon or damaging a public school bus.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-133: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(2), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-134.3. Domestic criminal trespass.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-135. Cutting, injuring, or removing another's timber.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-136. Setting fire to grass and brushlands and woodlands.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-137. Willfully or negligently setting fire to woods and fields.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-138: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(6), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Cross References.** — For present similar provisions, see § 14-138.1.

## § 14-138.1. Setting fire to grassland, brushland, or woodland.

Any person, firm, corporation, or other legal entity who shall in any manner whatsoever start any fire upon any grassland, brushland, or woodland without fully extinguishing the same, shall be guilty of a Class 3 misdemeanor which may include a fine of not less than ten dollars ($10.00) or more than fifty dollars ($50.00). For the purpose of this section, the term "woodland" includes timber and cutover land and all second growth stands on areas that were once cultivated. (1995, c. 210, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 210, s. 3, made this section effective upon ratification. The Act was ratified June 8, 1995.

## § 14-140: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(3), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Cross References.** — For present similar provisions, see § 14-140.1.

## § 14-140.1. Certain fire to be guarded by watchman.

Any person, firm, corporation, or other legal entity who shall burn any brush, grass, or other material whereby any property may be endangered or destroyed, without keeping and maintaining a careful watchman in charge of the burning, shall be guilty of a Class 3 misdemeanor which may include a fine of not less than ten dollars ($10.00) or more than fifty dollars ($50.00). Fire escaping from the brush, grass, or other material while burning shall be prima facie evidence of violation of this provision. (1995, c. 210, s. 2.)

**Editor's Note.** — Session Laws 1995, c. 210, s. 3, made this section effective upon ratification. The Act was ratified June 8, 1995.

## § 14-141. Burning or otherwise destroying crops in the field.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-142. Injuries to dams and water channels of mills and factories.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-144. Injuring houses, churches, fences and walls.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-145. Unlawful posting of advertisements.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-146. Injuring bridges.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-147. Removing, altering or defacing landmarks.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-148. Defacing or desecrating grave sites.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Interment of Body Required.** — The presence of a deceased body is an essential element of the crime of defacing or desecrating a grave under subdivision (a)(2) of this section, and to prove a violation of this section, the state must prove not only that the defendant willfully performed an act proscribed by the section, but that a deceased person was interred in the cemetery at the time the proscribed act was committed. State v. Phipps, 112 N.C. App. 626, 436 S.E.2d 280 (1993), aff'd, 338 N.C. 305, 449 S.E.2d 450 (1994).

Where the evidence showed there was not a body buried on the lot and there was no evidence that the lot would be used in the future for the burial of the dead, the lot was not a cemetery and subdivision (a)(2) does not apply. State v. Phipps, 338 N.C. 305, 449 S.E.2d 450 (1994).

## § 14-151. Interfering with gas, electric and steam appliances.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; unlawful reconnection of electricity, gas, or water; civil liability.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-152. Injuring fixtures and other property of gas companies; civil liability.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-153. Tampering with engines and boilers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-154. Injuring wires and other fixtures of telephone, telegraph and electric-power companies.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-155. Unauthorized connections with telephone or telegraph.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-156. Injuring fixtures and other property of electric-power companies.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-157. Felling trees on telephone and electric-power wires.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-158. Interfering with telephone lines.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-159. Injuring buildings or fences; taking possession of house without consent.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-159.1. Contaminating a public water system.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-159.2. Interference with animal research.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 22A.

## *Trespassing upon "Posted" Property to Hunt, Fish or Trap.*

## § 14-159.6. Trespass for purposes of hunting, etc., without written consent a misdemeanor.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-159.8. Mutilation, etc., of "posted" signs; posting signs without consent of owner or agent.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 22B.

## *First and Second Degree Trespass.*

### § 14-159.12. First degree trespass.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-159.13. Second degree trespass.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

#### CASE NOTES

**Cited** in State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993).

## ARTICLE 22C.

## *Cave Protection Act.*

### § 14-159.21. Vandalism; penalties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-159.22. Sale of speleothems unlawful; penalties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 23.

## *Trespasses to Personal Property.*

### § 14-160. Willful and wanton injury to personal property; punishments.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-160.1. Alteration, destruction or removal of permanent identification marks from personal property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-161: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(7), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-162. Removing boats.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-163.1. Injuring, maiming, or killing law-enforcement agency animal.

Any person who knows or has reason to know that an animal is used for law-enforcement purposes such as investigation, detection of narcotics or explosives, or crowd control, by any law-enforcement agency and who willfully and not in self defense, causes serious injury to, maims, or kills that animal is guilty of a Class I felony. (1983, c. 646, s. 1; 1993, c. 539, s. 108; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 258, s. 1.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, inserted "maiming" in the catchline, inserted "maims" preceding "or kills that animal", and substituted "Class I felony" for "Class 1 misdemeanor".

## § 14-164: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(8), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 24.

## *Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.*

### § 14-165. Malicious or willful injury to hired personal property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-166. Subletting of hired property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-167. Failure to return hired property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-168. Hiring with intent to defraud.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-168.1. Conversion by bailee, lessee, tenant or attorney-in-fact.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-168.4. Failing to return rented property on which there is purchase option.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-169. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 25.

### *Regulating the Leasing of Storage Batteries.*

**§§ 14-170 through 14-176:** Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(4)-(10), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals these sections effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

# SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

## ARTICLE 26.

## *Offenses against Public Morality and Decency.*

### § 14-177. Crime against nature.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

**This section is constitutional. —**

The right of privacy does not prohibit the prosecution of unmarried persons for consensual fellatio done in private. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

**Sexual Preference.** — Neither by its terms nor by judicial gloss proscribes sexual preference or the status of being homosexual; in order to violate the statute, a person must commit one of the specific acts coming within the purview of the statute. Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

A simple statement descriptive of an individual's alleged sexual orientation does not as a matter of law impute to that individual commission of a crime. Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

Referring to a person as "gay" or "bisexual" is not tantamount to charging that individual with the commission of a crime. Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

**Cited** in State v. Dellinger, 118 N.C. App. 529, 455 S.E.2d 877 (1995).

### § 14-178. Incest between certain near relatives.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

**Evidence.** — The crime of felonious incest has as an element that the defendant and the other participant be related in one of three enumerated familial ways, including parent-child. Thus, to prove one element of the offense in the case at hand, it was necessary to establish the parent-child relationship and it was error to then use the evidence of this relationship to find that defendant took advantage of a position of trust or confidence. State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76, cert. denied, 337 N.C. 697, 448 S.E.2d 536 (1994).

## § 14-179. Incest between uncle and niece and nephew and aunt.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-183. Bigamy.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-184. Fornication and adultery.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.1. Obscene literature and exhibitions.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.4. Coercing acceptance of obscene articles or publications.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.5. Preparation of obscene photographs, slides and motion pictures.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.8. Dissemination to minors under the age of 13 years.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.9. Indecent exposure.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.14. Displaying material harmful to minors.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.15. Disseminating harmful material to minors; exhibiting harmful performances to minors.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.16. First degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

(1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class D felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1196; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(o).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides:

"This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments. —**

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, substituted "Class D" for "Class E" in subsection (d).

## § 14-190.17. Second degree sexual exploitation of a minor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.17A. Third degree sexual exploitation of a minor.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-190.18. Promoting prostitution of a minor.

(a) Offense. — A person commits the offense of promoting prostitution of a minor if he knowingly:

(1) Entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or

(2) Supervises, supports, advises, or protects the prostitution of or by a minor.

(b) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(c) Punishment and Sentencing. — Violation of this section is a Class D felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1199; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(p).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments. —**

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, substituted "Class D" for "Class F" in subsection (c).

## § 14-190.19. Participating in prostitution of a minor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**§ 14-195:** Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(11), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-197. Using profane or indecent language on public highways; counties exempt.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-199. Obstructing way to places of public worship.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## §§ 14-200, 14-201: Repealed by Session Laws 1994, Extra Session, c. 14, ss. 72(9), 72(10), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals these sections effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-202. Secretly peeping into room occupied by female person.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-202.1. Taking indecent liberties with children.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

I. General Consideration.
II. Elements and Proof of Offense.
III. Evidence.

### I. GENERAL CONSIDERATION.

**Cited** in Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489 (1993); Nationwide Mut. Ins. Co. v. Abernethy, 115 N.C. App. 534, 445 S.E.2d 618 (1994).

### II. ELEMENTS AND PROOF OF OFFENSE.

**Age as an Aggravating Factor.** — Where age is an element of the offense, as with taking indecent liberties with children, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. If, however, the evidence shows that the victim was not more vulnerable than any other victim of the same crime would have been, the statutory aggravating factor that the victim was "very young" cannot properly be found. State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994).

**Evidence Held Sufficient.** —

Evidence of defendant's age held sufficient to sustain conviction for the offense of taking indecent liberties with a child. State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778, cert. denied, 335 N.C. 239, 439 S.E.2d 153 (1993).

**Testimony of child victim held sufficient, etc.**

The uncorroborated testimony of the victim is sufficient to convict under this section if the testimony establishes all of the elements of the offense. State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993).

### III. EVIDENCE.

**Expert Testimony Improperly Admitted as Substantive Evidence.** — In defendant's trial for first-degree rape and taking indecent liberties with a child, the trial court admitted expert's testimony as substantive evidence. To do so was error because expert testimony regarding the symptoms and characteristics of sexually abused children is admissible only to assist the jury in understanding the behavior patterns of sexually abused children, and must be so limited by the trial court. State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

## § 14-202.2. Indecent liberties between children.

(a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

(b) Indecent liberties between minors is punishable as a Class 1 misdemeanor. (1995, c. 494, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 494, s.2, made this section effective October 1, 1995.

## §§ 14-202.3 through 14-202.9: Reserved for future codification purposes.

## ARTICLE 26A.

## *Adult Establishments.*

## § 14-202.12. Violations; penalties.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 27.

## *Prostitution.*

### § 14-203. Definition of terms.

CASE NOTES

**Cited** in Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993); Phillips v. J.P. Stevens & Co., 827 F. Supp. 349 (M.D.N.C. 1993).

### § 14-204.1. Loitering for the purpose of engaging in prostitution offense.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-208. Punishment; probation; parole.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**§§ 14-208.1 through 14-208.4:** Reserved for future codification purposes.

## ARTICLE 27A.

## *Sexual Offender Registration Program.*

### § 14-208.5. Purpose.

The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest. Further, the General Assembly recognizes that local law enforcement officers' efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the agency's jurisdiction. Release of information about sex offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.

Therefore, it is the purpose of this Article to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register with local law enforcement agencies and to require the exchange of relevant information about sex offenders among law enforcement agencies and to authorize the access to necessary and relevant information about sex offenders to others as provided in this Article. (1995, c. 545, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 545, s. 3, made this article effective January 1, 1996 and applicable to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date.

Session Laws 1995, c. 545, s. 3, provides that this act shall be known as the "Amy Jackson Law".

## § 14-208.6. Definitions.

The following definitions apply in this Article:

(1) "Division" means the Division of Criminal Statistics of the Department of Justice.

(2) "Penal institution" means a detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction, or a county jail.

(3) "Release" means discharged or paroled.

(4) "Reportable conviction" means:

a. A final conviction for violation of G.S. 14-27.2 (first degree rape), 14-27.3 (second degree rape), 14-27.4 (first degree sexual offense), 14-27.5 (second degree sexual offense), 14-27.6 (attempted rape or sexual offense), 14-27.7 (intercourse and sexual offense with certain victims), 14-178 (incest between near relatives), 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), 14-190.16 (first degree sexual exploitation of a minor), 14-190.17 (second degree sexual exploitation of a minor), 14-190.17A (third degree sexual exploitation of a minor), 14-190.18 (promoting prostitution of a minor), 14-190.19 (participating in prostitution of a minor), or 14-202.1 (taking indecent liberties with children).

b. A final conviction in another state of an offense, which if committed in this State, would have been a sex offense as defined by the sections of the General Statutes set forth in paragraph a. of this subdivision.

(4) "Sheriff" means the sheriff of a county in this State. (1995, c. 545, s. 1.)

## § 14-208.7. Registration.

(a) A person who is a resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within 10 days of establishing residence in this State. If the person is a current resident of North Carolina, the person shall register:

(1) Within 10 days of release from a penal institution or arrival in a county to live outside a penal institution; or

(2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of 10 years following release from a penal institution. If no active term of imprisonment was imposed, registration shall be maintained for a period of 10 years following each conviction for a reportable offense.

(b) The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require:

(1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address;
(2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed;
(3) A current photograph; and
(4) The person's fingerprints.

The sheriff shall photograph the individual at the time of registration and take fingerprints from the individual at the time of registration both of which will be kept as part of the registration form. The registrant will not be required to pay any fees for the photograph or fingerprints taken at the time of registration.

(c) Not later than the third day after a person registers, the sheriff with whom the person registered shall send the registration information to the Division in a manner determined by the Division. The sheriff shall retain the original registration form and other information collected. (1995, c. 545, s. 1.)

## § 14-208.8. Prerelease notification.

(a) At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, an official of the penal institution shall:

(1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed;
(2) Obtain the registration information required under G.S. 14-208.7 (b)(1) and (2), as well as the address where the person expects to reside upon the person's release; and
(3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

(b) If a person who is subject to registration under this Article does not receive an active term of imprisonment, the court pronouncing sentence shall conduct, at the time of sentencing, the notification procedures specified in subsection (a) of this section. (1995, c. 545, s. 1.)

## § 14-208.9. Change of address.

If a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered. Not later than the third day after receipt of the notice, the sheriff shall forward this information to the Division. If the person moves to another county in this State, the Division shall inform the sheriff of the new county of the person's new residence. (1995, c. 545, s. 1.)

## § 14-208.10. Access to registration information.

(a) To obtain information concerning an individual's registration status, a requester shall submit to the sheriff the following:

(1) The individual's name and sex;

(2) A physical description of the individual; and

(3) Any other relevant information known to the requester concerning the individual.

Upon receipt of the information, the sheriff shall verify, in writing, to the requester whether the individual has registered as a sex offender in this State, the date of conviction, and the offenses for which registration was required. The registration information and the corresponding registry is a public record and shall be available for public inspection. The sheriff shall upon request, display any photograph provided in compliance with G.S. 14-208.7(b)(3); however, the sheriff shall not provide or allow a copy to be made of the photograph.

(b) Any person may obtain a copy of an individual's registration form, excluding the photograph, upon payment to the sheriff of a reasonable fee for the costs of duplicating the form.

(c) The sheriff of each county is authorized, upon written request, to provide a copy of the entire registry to any group, entity, organization, corporation, or school, that utilizes volunteers or employees in working with, caring for, supervising or protecting children or disabled or elderly persons. The sheriff may charge a reasonable fee for duplicating costs and for mailing costs when appropriate. (1995, c. 545, s. 1.)

## § 14-208.11. Failure to register.

(a) A person required by this Article to register who, knowingly and with the intent to violate the provisions of this Article, fails to register shall be guilty of a Class 3 misdemeanor for a first conviction of a violation of this Article, and a Class I felony for a subsequent conviction of a violation of this Article.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3). (1995, c. 545, s. 1.)

## § 14-208.12. Exemption.

(a) A person who has a reportable conviction may petition the superior court in the county where the person resides for an exemption from this Article. The person shall serve a copy of the petition on the district attorney. If the person shows for good cause, by clear and convincing evidence, that registration will not serve any useful purpose, the court shall grant the exemption.

(b) When a registered person presents the sheriff with a certified copy of the court order showing that an exemption has been granted, the sheriff shall remove any information from his records that was obtained pursuant to this Article. The sheriff shall then notify the

Division of the exemption by sending a copy of the exemption to the Division within three days and the Division shall remove any information from its files obtained pursuant to this Article. The Division shall notify the registered person of the exemption by letter telling the registrant that the exemption has been accomplished. (1995, c. 545, s. 1.)

### § 14-208.13. File with Police Information Network.

(a) The Division shall include the registration information in the Police Information Network as set forth in G.S. 114-10.1.

(b) Except as provided in G.S. 14-208.12(b), the Division shall maintain the registration information permanently even after the registrant's reporting requirement expires. (1995, c. 545, s. 1.)

## SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

## Article 28.

## *Perjury.*

### § 14-209. Punishment for Perjury.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-210. Subornation of perjury.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-211. Perjury before legislative committees.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-212: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(7), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 29.

## *Bribery.*

## § 14-217. Bribery of officials.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Cited** in State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

## § 14-218. Offering bribes.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Evidence Held Sufficient.** — The offer of money to an Alcohol Beverage Control (ABC) enforcement officer with the request that the officer arrest or stop a person for driving while impaired is a bribe within the meaning of this section. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

**A corrupt intent means** a wrongful design to acquire some pecuniary profit or other advantage. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

## § 14-220. Bribery of jurors.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 30.

## *Obstructing Justice.*

### § 14-221. Breaking or entering jails with intent to injure prisoners.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

#### CASE NOTES

**Specific Intent Is Element of Offense.** — All of the codified obstruction of justice offenses found at § 14-221 through § 14-227 are specific intent crimes, requiring that the state present evidence that the defendant acted willfully or with purpose in committing the offense. State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

### § 14-222: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(12), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

### § 14-223. Resisting officers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

#### CASE NOTES

I. General Consideration.

#### I. GENERAL CONSIDERATION.

**Communications simply intended to assert rights, seek clarification or obtain information** in a peaceful way are not chilled by this section. Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995).

**Cited** in Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

## § 14-225. False reports to law enforcement agencies or officers.

Any person who shall willfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty, shall be guilty of a Class 2 misdemeanor. (1941, c. 363; 1969, c. 1224, s. 3; 1993, c. 539, s. 137; 1994, Ex. Sess., c. 23, ss. 1-3; c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 23, s. 3, effective October 1, 1994, repeals Section 137 of Chapter 539 of the 1993 Session Laws, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), which would have amended this section effective October 1, 1994, by substituting "Class 2 misdemeanor" for former penalty provisions.

Session Laws 1994, Extra Session, c. 23, s. 4, which amended this section, provides: "Prosecutions for offenses committed before the effective dates of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 23, s. 1, effective July 1, 1994, and applicable to offenses occurring on or after that date, substituted "False reports to law enforcement agencies or officers" for "False, etc., reports to police radio broadcasting stations" in the catchline of this section; substituted "law enforcement agency or officer" for "police radio broadcasting station," substituted "of a law enforcement agency" for "thereof," and substituted "law enforcement officer" for "peace officer."

The 1994 Extra Session amendment by c. 23, s. 2, effective on the same day that Chapter 538 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both."

## § 14-225.1. Picketing or parading.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-225.2. Harassment of and communication with jurors.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-226. Intimidating or interfering with witnesses.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-226.1. Violating orders of court.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-227. Failing to attend as witness before legislative committees.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 30A.

## *Secret Listening.*

## § 14-227.3. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 31.

## *Misconduct in Public Office.*

## § 14-228. Buying and selling offices.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-230. Willfully failing to discharge duties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Failure to Establish Defendant Was an Official.** — Where the State failed to show any instance where the defendant could exercise sovereign power at any time in the course of his employment and failed to show that the defendant's position of senior administrator at school for the blind was created by statute, constitution, or delegation of state authority, the state failed to establish he was an official of a state institution. State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

## § 14-231. Failing to make reports and discharge other duties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-232. Swearing falsely to official reports.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-233. Making of false report by bank examiners; accepting bribes.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

(a) If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions or savings and loan associations or public utilities regulated under the provisions of Chapter 62 of the General Statutes in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board by specific resolution on which such public official shall not vote.

(b) Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period had a financial association with such director, board member, commissioner or employee.

(c1) The fact that a person owns ten percent (10%) or less of the stock of a corporation or has a ten percent (10%) or less ownership in any other business entity or is an employee of said corporation or other business entity does not make the person "in any manner interested" or "concerned or interested in making such contract, or in the profits thereof," as such phrase is used in subsection (a) of this section, and does not make the person one who "had a financial association," as defined in subsection (c) of this section; provided that in order for the exception provided by this subsection to apply, such undertaking or contracting must be authorized by the governing board by specific resolution on which such public official shall not vote.

(d) The provisions of subsection (c) shall not apply to any transactions meeting the requirements of Article 3, Chapter 143 of the General Statutes or any other transaction specifically authorized by the Advisory Budget Commission.

(d1) The first sentence of subsection (a) shall not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 7,500 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 7,500 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 7,500 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed ten thousand dollars ($10,000) for medically related services and fifteen thousand dollars ($15,000) for other goods or services within a 12-month period; and

(2) The official entering into the contract or undertaking with the unit or agency does not in his official capacity participate in any way or vote; and

(3) The total annual amount of undertakings or contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county; and

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse board, or public hospital which undertakes or contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such undertakings or contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) The provision of subsection (d1) shall not apply to contracts required by Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to G.S. 143-215.74 by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor. (1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4.)

**Local Modification.** — Bladen: 1993 (Reg. Sess., 1994), c. 721, s. 3; Northhampton: 1995, c. 260, s. 6.

For additional local modifications to this section, see the main pamphlet.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective July 29, 1995, added subsection (d3).

## § 14-234.1. Misuse of confidential information.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-235: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(11), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, c. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-237. Buying school supplies from interested officer.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-238. Soliciting during school hours without permission of school head.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-239. Allowing prisoners to escape; punishment.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-241. Disposing of public documents or refusing to deliver them over to successor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-242. Failing to return process or making false return.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-243. Failing to surrender tax list for inspection and correction.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-244. Failing to file report of fines or penalties.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-246. Failure of ex-magistrate to turn over books, papers and money.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-247. Private use of publicly owned vehicle.

**Local Modification.** — Town of Matthews: 1995, c. 176, s. 1.

For additional local modifications to this section, see the main pamphlet.

## § 14-250. Publicly owned vehicle to be marked.

**Editor's Note.** —

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 biennium."

Session Laws 1995, c. 507, s. 6.1, provides:

"(a) Pursuant to the provisions of G.S. 14-250, for the 1995-97 fiscal biennium, the General Assembly authorizes the use of private license tags on State-owned motor vehicles only for the State Highway Patrol and for the following:

| Department | Exemption Category | Number |
|---|---|---|
| Motor Vehicles | License and Theft | 97 |
| Justice | SBI Agents | 277 |
| Correction | Probation/Parole Surveillance Officers (intensive probation) | 25 |
| Crime Control and Public Safety | ALE Officers | 92 |
| Revenue | | 3 |
| Capital Area Police | | 2 |

"(b) The 92 ALE vehicles authorized by this section to use private license tags shall be distributed as follows:

"(1) 54 among Agent I officers;

"(2) 20 among Agent II officers;

"(3) 1 to the Deputy Director;

"(4) 12 to the District Offices/Extra Vehicles; and

"(5) 5 to the Director, to be distributed at the Director's discretion.

"(c) Except as provided in this section, all State-owned motor vehicles shall bear permanent registration plates issued under G.S. 20-84."

### § 14-251. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 32.

## *Misconduct in Private Office.*

### § 14-253. Failure of certain railroad officers to account with successors.

If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a Class I felony. The Governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (1870-1, c. 72, ss. 1-3; Code, ss. 2001, 2002; Rev., s. 3760; C.S., s. 4400; 1993 c. 539, ss. 157, 1215; 1993 (Reg. Sess., 1994), c. 767, s. 20.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Effect of Amendments.** —

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, deleted the former second sentence, which read "All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a Class 1 misdemeanor."

## § 14-254. Malfeasance of corporation officers and agents.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 33.

## *Prison Breach and Prisoners.*

## § 14-255. Escape of working prisoners from custody.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-256. Prison breach and escape from county or municipal confinement facilities or officers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Applied** in State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994).

## § 14-257: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(12), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, c. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Number of Conspiracy Counts Allowed.** — Defendant could only be convicted of one count of conspiracy to provide an inmate with a controlled substance, even though four incidents occurred, where the offenses transpired over a short period of time, the participants in the conspiracies for which defendant was indicted remained the same, the indictments all averred the same objective, delivering controlled substances to the inmate coconspirator, and the state presented no evidence concerning the number of meetings which took place between defendant and the other participants. State v. Griffin, 112 N.C. App. 838, 437 S.E.2d 390 (1993).

## § 14-258.2. Possession of dangerous weapon in prison.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-258.3. Taking of hostage, etc., by prisoner.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-259. Harboring or aiding certain persons.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 34.

## *Custodial Institutions.*

## § 14-268. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

## ARTICLE 35.

## *Offenses Against the Public Peace.*

## § 14-269. Carrying concealed weapons.

(a) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises.

(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter.

(b) This prohibition shall not apply to the following persons:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;

(2) Civil officers of the United States while in the discharge of their official duties;

(3) Officers and soldiers of the militia and the national guard when called into actual service;
(4) Officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;
(5) Sworn law-enforcement officers, when off-duty, if:
  a. Written regulations authorizing the carrying of concealed weapons have been filed with the clerk of superior court in the county where the law-enforcement unit is located by the sheriff or chief of police or other superior officer in charge; and
  b. Such regulations specifically prohibit the carrying of concealed weapons while the officer is consuming or under the influence of alcoholic beverages.

(b1) It is a defense to a prosecution under this section that:
(1) The weapon was not a firearm;
(2) The defendant was engaged in, or on the way to or from, an activity in which he legitimately used the weapon;
(3) The defendant possessed the weapon for that legitimate use; and
(4) The defendant did not use or attempt to use the weapon for an illegal purpose.

The burden of proving this defense is on the defendant.

(c) Any person violating the provisions of subsection (a) of this section shall be guilty of a Class 2 misdemeanor. Any person violating the provisions of subsection (a1) of this section shall be guilty of a Class 2 misdemeanor for the first offense. A second or subsequent offense is punishable as a Class I felony.

(d) This section does not apply to an ordinary pocket knife carried in a closed position. As used in this section, "ordinary pocket knife" means a small knife, designed for carrying in a pocket or purse, that has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive, or spring action. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C.S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 86; 1985, c. 432, ss. 1-3; 1993, c. 539, s. 163; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 398, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, in subsection (a) deleted "except when on his own premises" preceding "willfully and intentionally", deleted "pistol, gun" following "stun gun", added "except when the person is on the person's own premises", and deleted the second and third sentences regarding ordinary pocket knives; added subsection (a1); in subdivision (b)(5) deleted "Full-time" preceding "Sworn", and deleted "in the jurisdiction where they are assigned" following "off-duty"; in subsection (c) substituted "subsection (a) of this section" for "this section" in the first sentence, and added the second and third sentences; and added subsection (d).

### CASE NOTES

IV. Illustrative Cases.

#### IV. ILLUSTRATIVE CASES.

**Sitting on Firearm.** — Where officer approached the defendant's car and, using his flashlight, looked into the interior, viewed the empty holster next to the defendant, asked the defendant where his gun was and was told by the defendant that the defendant was sitting on the gun, the officer then had probable cause to arrest the defendant for carrying a concealed weapon. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

## § 14-269.1. Confiscation and disposition of deadly weapons.

Upon conviction of any person for violation of G.S. 14-2.2, 14-269, 14-269.7, or any other offense involving the use of a deadly weapon of a type referred to in G.S. 14-269, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered confiscated and disposed of by the presiding judge at the trial in one of the following ways in the discretion of the presiding judge.

(1) By ordering the weapon returned to its rightful owner, but only when such owner is a person other than the defendant and has filed a petition for the recovery of such weapon with the presiding judge at the time of the defendant's conviction, and upon a finding by the presiding judge that petitioner is entitled to possession of same and that he was unlawfully deprived of the same without his consent.

(2), (3) Repealed by Extra Session c. 16, s. 2, effective May 1, 1994.

(4) By ordering such weapon turned over to the sheriff of the county in which the trial is held or his duly authorized agent to be destroyed. The sheriff shall maintain a record of the destruction thereof.

(5) By ordering such weapon turned over to the North Carolina State Bureau of Investigation's Crime Laboratory Weapons Reference Library for official use by that agency. The State Bureau of Investigation shall maintain a record and inventory of all such weapons received.

(6) By ordering such weapons turned over to the North Carolina Justice Academy for official use by that agency. The North Carolina Justice Academy shall maintain a record and inventory of all such weapons received. (1965, c. 954, s. 2; 1967, c. 24, s. 3; 1983, c. 517; 1989, c. 216; 1993, c. 259, s. 2; 1994, Ex. Sess., c. 16, s. 2; c. 22, s. 23.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 22, which amended this section, provides in s. 24: "Prosecutions for, or sentences based on, offenses committed before the effective dates of this Part are not abated or affected by this Part, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this Part remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 22, which amended this section, in s. 1 provides: "This act shall be known as the Crime Control Act of 1994."

**Effect of Amendments.** —

Session Laws 1994, Extra Session, c. 16, s. 2, effective May 1, 1994, repealed subdivisions (2) and (3) of this section.

Session Laws 1994, Extra Session, c. 22, s. 23, effective May 1, 1994, and applicable to offenses committed on or after that date, substituted "G.S. 14-2.2, 14-269, 14-269.7" for "G.S. 14-269, G.S. 14-269.7" in the introductory language.

## § 14-269.2. Weapons on campus or other educational property.

(a) The following definitions apply to this section:

(1) Educational property. — Any public or private school building or bus, public or private school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education, school, college, or university board of trustees, or directors for the administration of any public or private educational institution.

(2) Student. — A person enrolled in a public or private school, college or university, or a person who has been suspended or expelled within the last five years from a public or private school, college or university, whether the person is an adult or a minor.

(3) Switchblade knife. — A knife containing a blade that opens automatically by the release of a spring or a similar contrivance.

(4) Weapon. — Any device enumerated in subsection (b) or (d) of this section.

(b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(c) It shall be a Class I felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(d) It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(e) It shall be a Class 1 misdemeanor for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), and any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(f) Notwithstanding subsection (b) of this section it shall be a Class 1 misdemeanor rather than a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, on educational property if:

(1) The person is not a student attending school on the educational property;
(2) The firearm is not concealed within the meaning of G.S. 14-269;
(3) The firearm is not loaded and is in a locked container, a locked vehicle, or a locked firearm rack which is on a motor vehicle; and
(4) The person does not brandish, exhibit, or display the firearm in any careless, angry, or threatening manner.

(g) This section shall not apply to:
(1) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority;
(2) Armed forces personnel, officers and soldiers of the militia and national guard, law-enforcement personnel, fire fighters, emergency service personnel, North Carolina Forest Service personnel, and any private police employed by an educational institution, when acting in the discharge of their official duties; or
(3) Home schools as defined in G.S. 115C-563(a). (1971, c. 241, ss. 1, 2; c. 1224; 1991, c. 622, s. 1; 1993, c. 539, s. 164; c. 558, s. 1; 1994, Ex. Sess., c. 14, s. 4(b); 1995, c. 49, s. 1.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 4(a), effective October 1, 1994, repeals Session Laws 1993, c. 539, s. 164, which as amended by 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994, would have amended this section as it read prior to amendment by Session Laws 1993, c. 558, s. 1 by substituting "Class 2 misdemeanor" for former penalty provisions.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — Session Laws 1994, Extra Session, c. 14, s. 4(b), effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "that opens" for "or blades which open" in subdivision (a)(3); inserted "stun gun" in subsections (b), (c), (d), and (e); and inserted "Class 1" preceding "misdemeanor" in subsections (d), (e), and (f).

The 1995 amendment, effective April 26, 1995, inserted "fire fighters, emergency service personnel, North Carolina Forest Service personnel" following "law-enforcement personnel" in subdivision (g)(2).

**Legal Periodicals.** — For note, "Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection From Peer Abuse in Public Schools," see 1993 Duke L.J. 588.

## § 14-269.3. Carrying weapons into assemblies and establishments where alcoholic beverages are sold and consumed.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-269.4. Weapons on State property and in courthouses.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-269.6. Possession and sale of spring-loaded projectile knives prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-269.7. Prohibitions on handguns for minors.

(a) Any minor who possesses or carries a handgun is guilty of a Class 2 misdemeanor.

(b) This section does not apply:

(1) To officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties or acting under orders requiring them to carry handguns.

(2) To a minor who possesses a handgun for educational or recreational purposes while the minor is supervised by an adult who is present.

(3) To an emancipated minor who possesses such handgun inside his or her residence.

(4) To a minor who possesses a handgun while hunting or trapping outside the limits of an incorporated municipality if he has on his person written permission from a parent, guardian, or other person standing in loco parentis.

(c) The following definitions apply in this section:

(1) Handgun. — A firearm that has a short stock and is designed to be fired by the use of a single hand, or any combination of parts from which such a firearm can be assembled.

(2) Minor. — Any person under 18 years of age. (1993, c. 259, s. 1; 1994, Ex. Sess., c. 14, s. 5; 1993 (Reg. Sess., 1994), c. 597, s. 1.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor punishable by imprisonment for up to six months, a fine of up to five hundred dollars ($500.00), or both" in subsection (a).

The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995 and applicable to offenses committed on or after that date, in subdivision (c)(1) substituted "A" for "Any dangerous," substituted "that has a short stock and is" for "including a pistol or revolver" and added at the end "or any combination of parts from which such a firearm can be assembled"; and in subdivision (c)(2) deleted "the age of" preceding "18."

## § 14-269.8. Purchase of firearms by person subject to domestic violence order prohibited.

(a) It is unlawful for any person to purchase or attempt to purchase any gun, rifle, pistol, or other firearm while there remains in force and effect a domestic violence order issued pursuant to Chapter 50B of the General Statutes, prohibiting the person from purchasing a firearm.

(b) Any person violating the provisions of this section shall be guilty of a Class H felony. (1995, c. 527, s. 2.)

**Editor's Note.** — Session Laws 1995, c. 527, s. 4, made this section effective October 1, 1995, and applicable to offenses committed on or after that date.

## §§ 14-270, 14-271: Repealed by Session Laws 1994, Extra Session, c. 14, ss. 72, 73, effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-275.1. Disorderly conduct at bus or railroad station or airport.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-276.1. Impersonation of firemen or emergency medical services personnel.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-277. Impersonation of a law-enforcement or other public officer.

**Editor's Note.** —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra

Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-277.1. Communicating threats.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Cited** in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

## § 14-277.2. Weapons at parades, etc., prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-277.3. Stalking.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Legal Periodicals.** — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

## § 14-277.4. Obstruction of health care facilities.

(a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.

(b) No person shall injure or threaten to injure a person who is or has been:

(1) Obtaining health care services;
(2) Lawfully aiding another to obtain health care services; or
(3) Providing health care services.

(c) A violation of subsection (a) or (b) of this section is a Class 2 misdemeanor. A second conviction for a violation of either subsection (a) or (b) of this section within three years of the first shall be punishable as a Class 1 misdemeanor. A third or subsequent conviction for a violation of either subsection (a) or (b) of this section within three years of the second or most recent conviction shall be punishable as a Class I felony.

(d) Any person aggrieved under this section may seek injunctive relief in a court of competent jurisdiction to prevent threatened or further violations of this section. Any violation of an injunction obtained pursuant to this section constitutes criminal contempt and shall be punishable by a term of imprisonment of not less than 30 days and no more than 12 months.

(e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

(f) "Health care facility" as used in this section means any hospital, clinic, or other facility that is licensed to administer medical treatment or the primary function of which is to provide medical treatment in this State.

(g) "Health care services" as used in this section means services provided in a health care facility.

(h) Persons subject to the prohibitions in subsection (a) of this section do not include owners, officers, agents, or employees of the health care facility or law enforcement officers acting to protect real or personal property. (1993, c. 412, s. 1; 1994, Ex. Sess., c. 14, s. 6; 1993 (Reg. Sess., 1994), c. 767, s. 21.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, in subsection (c), substituted "Class 2 misdemeanor" for "misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment not to exceed six months, or both" in the first sentence, and substituted "Class 1" for "general" in the second sentence.

The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, deleted "or attempt" preceding "or threaten" in subsection (b).

## CASE NOTES

**Standing to Challenge Constitutionality.** — Prolife abortion activists had legal standing to challenge the constitutionality of this section. Hoffman v. Hunt, 845 F. Supp. 340 (W.D.N.C. 1994).

United States District Court found that this section bore sufficient constitutional flaws to state a claim and posed a sufficiently imminent and real threat to plaintiffs' rights to cause a cognizable injury in fact to confer standing upon them to challenge the statute in court. Hoffman v. Hunt, 845 F. Supp. 340 (W.D.N.C. 1994).

# SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

## Article 36.

## *Offenses Against the Public Safety.*

### § 14-278. Willful injury to property of railroads.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-279. Unlawful injury to property of railroads.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-279.1. Unlawful impairment of operation of railroads.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-280. Shooting or throwing at trains or passengers.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-281. Operating trains and streetcars while intoxicated.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-281.1. Throwing, dropping, etc., objects at sporting events.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-282. Displaying false lights on seashore.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-283. Exploding dynamite cartridges and bombs.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-284. Keeping for sale or selling explosives without a license.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-284.1. Regulation of sale of explosives; reports; storage.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-284.2. Dumping of toxic substances.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-285: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72, effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-286. Giving false fire alarms; molesting fire-alarm, fire-detection or fire-extinguishing system.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-286.1. Making false ambulance request.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-286.2. Interfering with emergency communication.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-287. Leaving unused well open and exposed.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288. Unlawful to pollute any bottles used for beverages.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 36A.

## *Riots and Civil Disorders.*

## § 14-288.2. Riot; inciting to riot; punishments.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Evidence Held Sufficient.** — Evidence of defendant's resistance to being arrested and the apparent assault on police officer did not by itself appear sufficient to support the charge of participation in riotous activity. However, this conduct when coupled with the defendant's deliberate act of running into the table upon which the officer was standing while the riot was taking place, was clearly sufficient to show that the defendant "willfully engaged" in the riot. State v. Mitchell, 110 N.C. App. 250, 429 S.E.2d 580 (1993).

## § 14-288.4. Disorderly conduct.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.5. Failure to disperse when commanded a misdemeanor; prima facie evidence.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.6. Looting; trespass during emergency.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Construction with Other Provisions. —** Reading this section in pari materia with § 14-415.1, it is clear that the footnote to this section which reads "nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or ... place of business" does not apply to weapons of mass death and destruction; North Carolina did not intend to restore to its ex-felons the right to possess such weapons within their own homes, in contravention of the general federal prohibition against felons possessing firearms. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

**Sawed-Off Shotgun. —** With limited and specific exceptions, no one in North Carolina, ex-felon or otherwise, may possess, store or acquire a sawed-off shotgun for any reason or under any circumstance. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

**Cited** in State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

## § 14-288.9. Assault on emergency personnel; punishments.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.13. Powers of counties to enact ordinances to deal with states of emergency.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.

(a) The chairman of the board of commissioners of any county who has been requested to do so by a mayor may by proclamation extend the effect of any one or more of the prohibitions and restrictions imposed in that mayor's municipality pursuant to the authority granted in G.S. 14-288.12. The chairman may extend such prohibitions and restrictions to any area within his county in which he determines it to be necessary to assist in controlling the state of emergency within the municipality. No prohibition or restriction extended by proclamation by the chairman under the authority of this section shall apply within the limits of any other municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless that other municipality by resolution consents to its application.

(b) Whenever any chairman of the board of county commissioners extends the effect of municipal prohibitions and restrictions under the authority of this section to any area of the county, it shall be deemed that a state of emergency has been validly found and declared with respect to such area of the county.

(c) Any chairman of a board of county commissioners extending prohibitions and restrictions under the authority of this section must take reasonable steps to give notice of its terms to those likely to be affected. The chairman of the board of commissioners shall proclaim the termination of any prohibitions and restrictions extended under the authority of this section upon:

(1) His determination that they are no longer necessary; or

(2) The determination of the board of county commissioners that they are no longer necessary; or

(3) The termination of the prohibitions and restrictions within the municipality.

(d) The powers authorized under this section may be exercised whether or not the county has enacted ordinances under the authority of G.S. 14-288.13. Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any ordinances enacted by the county under the authority of G.S. 14-288.13.

(e) Any person who violates any provision of any prohibition or restriction extended by proclamation under the authority of this section is guilty of a Class 3 misdemeanor. (1969, c. 869, s. 1; 1993, c. 539, s. 196; 1994, Ex. Sess., c. 14, s. 7; c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1994 Extra Session amendment by c. 14, s. 7, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "are" in subdivision (c)(1).

## § 14-288.15. Authority of Governor to exercise control in emergencies.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.19. Governor's power to order evacuation of public building.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-288.20. Certain weapons at civil disorders.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

## ARTICLE 37.

## *Lotteries, Gaming, Bingo and Raffles.*

## Part 1. Lotteries and Gaming.

### § 14-289. Advertising lotteries.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-290. Dealing in lotteries.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

**Cited** in Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

### § 14-291. Selling lottery tickets and acting as agent for lotteries.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

**Cited** in Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

## § 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-291.2. Pyramid and chain schemes prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-292. Gambling.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Sufficiency of Indictment.** — Where misdemeanor statement of charges referenced the violation and stated that defendant unlawfully and willfully operated a game of chance, "a poker machine by paying a player money for said player's score," the misdemeanor statement of charges were sufficiently alleged so as to charge defendant with two counts of gambling. State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

**Cited** in Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

## § 14-293. Allowing gambling in houses of public entertainment; penalty.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-294. Gambling with faro banks and tables.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-299. Property exhibited by gamblers to be seized; disposition of same.

### CASE NOTES

**Cited** in Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

## § 14-300. Opposing destruction of gaming tables and seizure of property.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-303. Violation of two preceding sections a misdemeanor.

A violation of any of the provisions of G.S. 14-301 or 14-302 shall be a Class 2 misdemeanor. (1923, c. 138, s. 5; C.S., s. 4437(c); 1993, c. 366, s. 2, c. 539, s. 210; 1994, Ex. Sess., c. 14, s. 8(b).)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 8(a), effective October 1, 1994, repealed Session Laws 1993, c. 539, s. 210, which effective October 1, 1994, would have amended this section as it read prior to amendment by Session Laws 1993, c. 366, s. 2 by substituting "Class 2 misdemeanor" for former penalty provisions.

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 14, s. 8(b), effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court or both."

## § 14-306. Slot machine or device defined.

### CASE NOTES

**Test of Character of Game.** — In State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953), the N.C. Supreme Court determined that the test of the character of a game is whether it is a game of chance or a game of skill, not whether it contains an element of chance or skill, but which is the dominating element that determines the result of the game; or, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. Collins Coin Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994).

**Video Card Game Held Illegal.** — Where the operation of video card game depended upon chance rather than a player's skill or dexterity, and a player could win, from a single hand, coupons worth more than ten dollars ($10.00), plaintiff's machines did not fall within the exception in this section and were illegal slot machines. Collins Coin Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994).

**Cited** in Ford v. State, Dep't of Crime Control & Pub. Safety, 115 N.C. App. 556, 445 S.E.2d 425 (1994).

## § 14-309. Violation made misdemeanor.

Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 2 misdemeanor. (1937, c. 196, s. 6; 1993, c. 366, s. 3, c. 539, s. 211; 1994, Ex. Sess., c. 14, s. 9(b).)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 9(a), effective October 1, 1994, repeals Session Laws 1993, c. 539, s. 210, which effective October 1, 1994, would have amended this section as it read prior to amendment by Session Laws 1993, c. 366, s. 3 by substituting "Class 2 misdemeanor" for former penalty provisions.

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 14, s. 9(b), effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court or both."

## Part 2. Bingo and Raffles.

### § 14-309.5. Bingo.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-309.11. Accounting and use of proceeds.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-309.14. Beach bingo.

Nothing in this Article shall apply to "beach bingo" games except for the following subdivisions:

(1) No beach bingo game may offer a prize having a value greater than ten dollars ($10.00). Any person offering a greater than ten-dollar ($10.00) but less than fifty-dollar ($50.00) prize is guilty of a Class 2 misdemeanor. Any person offering a prize of fifty dollars ($50.00) or greater is guilty of a Class I felony.

(2) No beach bingo game may be held in conjunction with any other lawful bingo game, with any "promotional bingo game", or with any offering of an opportunity to obtain anything of value, whether for valuable consideration or not. No beach bingo game may offer free bingo games as a promotion, for prizes or otherwise. Any person who violates this subsection is guilty of a Class I felony.

(3) G.S. 18B-308 shall apply to beach bingo games.

(4) Upon conviction under any provision of this section, such person shall not conduct a bingo game for a period of at least one year. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 10; 1987, c. 701; 1989 (Reg. Sess., 1990), c. 826, s. 2; 1993, c. 539, ss. 214, 1232; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section is reprinted to correct an error in the historical citation in the main pamphlet.

Session Laws 1993, c. 539, s. 1232 redesignated former subdivisions (a) and (b) as (1) and (2), respectively, but left the subdivision designations (c) and (d) unchanged. Subdivisions (c) and (d) have been redesignated as subdivisions (3) and (4), respectively, at the direction of the Revisor of Statutes.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra

Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-309.15. Raffles.

**Editor's Note. —**

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 38.

## *Marathon Dances and Similar Endurance Contests.*

**§§ 14-310 through 14-312:** Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(13)—(15), effective October 1, 1994.

**Editor's Note.** — Repealed § 14-311 would have been amended by Session Laws 1994, Extra Session, c. 14, s. 10, effective October 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## ARTICLE 39.

## *Protection of Minors.*

## § 14-313. Youth access to tobacco products.

(a) Definitions. — The following definitions apply in this section:

(1) Distribute. — To sell, furnish, give, or provide tobacco products, including tobacco product samples, or cigarette wrapping papers to the ultimate consumer.

(2) Proof of age. — A drivers license or other documentary or written evidence that purports to establish that the person is 18 years of age or older.

(3) Sample. — A tobacco product distributed to members of the general public at no cost for the purpose of promoting the product.

(4) Tobacco product. — Any product that contains tobacco and is intended for human consumption.

(b) Sale or distribution to persons under the age of 18 years. — If any person shall knowingly distribute, or knowingly aid, assist, or abet any other person in distributing tobacco products or cigarette wrapping papers to any person under the age of 18 years, or if any person shall knowingly purchase tobacco products or cigarette wrapping papers on behalf of a person, less than 18 years, the person shall be guilty of a Class 2 misdemeanor; provided, however, that it shall not be unlawful to distribute tobacco products or cigarette wrapping papers to an employee when required in the performance of the employee's duties.

A person engaged in the sale of tobacco products shall demand proof of age from a prospective purchaser if the person has reasonable grounds to believe that the prospective purchaser is under 18 years of age. Failure to demand proof of age as required by this subsection is a Class 2 misdemeanor. Proof that the defendant demanded, was shown, and reasonably relied upon proof of age shall be a defense to any action brought under this subsection.

(c) Purchase by persons under the age of 18 years. — If any person under the age of 18 years purchases or accepts receipt, or attempts to purchase or accept receipt, of tobacco products or cigarette wrapping papers, or presents or offers to any person any purported proof of age which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product, the person shall be guilty of an infraction as provided in G.S. 14-3.1.

(d) Send or assist person less than 18 years to purchase or receive tobacco product. — If any person shall knowingly send or assist a person less than 18 years to purchase, acquire, receive, or attempt to purchase, acquire, or receive tobacco products or cigarette wrapping papers, the person shall be guilty of a Class 2 misdemeanor; provided, however, persons under the age of 18 may be enlisted by police or local sheriffs' departments to test compliance if the testing is under the direct supervision of that law enforcement department and written parental consent is provided; provided further, that the Department of Human Resources shall have the authority, pursuant to a written plan prepared by the Secretary of Human Resources, to use persons under 18 years of age in annual, random, unannounced inspections, provided that prior written parental consent is given for the involvement of these persons and that the inspections are conducted for the sole purpose of preparing a scientifically and methodologically valid statistical study of the extent of success the State has achieved in reducing the availability of tobacco products to persons under the age of 18, and preparing any report to the extent required by section 1926 of the federal Public Health Service Act (42 USC § 300x-26).

(e) Statewide uniformity. — It is the intent of the General Assembly to prescribe this uniform system for the regulation of tobacco products to ensure the eligibility for and receipt of any federal funds or grants that the State now receives or may receive relating to the provisions of G.S. 14-313. To ensure uniformity, no political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules or regulations concerning the sale, distribution, display or promotion of tobacco products or cigarette wrapping papers on or after September 1, 1995. This subsection does not apply to the regulation of vending machines, nor does it prohibit the Secretary of Revenue from adopting rules with respect to the administration of the tobacco products taxes levied under Article 2A of Chapter 105 of the General Statutes. (1891, c. 276; Rev., s. 3804; C.S., s. 4438; 1969, c. 1224, s. 3; 1991, c. 628, s. 1; 1993, c. 539, s. 216; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 241, s. 1.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

This section was amended by Session Laws 1995, c. 241, s. 1, in the coded bill drafting format provided by § 120-20.1. The first paragraph of subsection (b) has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1995, c. 241, s. 2, provides that subsection (e), as enacted by that act, does not affect local ordinances adopted before September 1, 1995.

**Effect of Amendments.** — The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, rewrote the catchline which read "Selling cigarettes to minors"; added subsections (a), (c), (d) and (e); added the subsection (b) designation; and rewrote subsection (b). As to the applicability of subsection (e), see the editor's note.

## § 14-315. Selling or giving weapons to minors.

(a) Sale of Weapons Other Than Handguns. — If a person sells, offers for sale, gives, or in any way transfers to a minor any pistol cartridge, brass knucks, bowie knife, dirk, shurikin, leaded cane, or slungshot, the person is guilty of a Class 1 misdemeanor and, in addition, shall forfeit the proceeds of any sale made in violation of this section.

(a1) Sale of Handguns. — If a person sells, offers for sale, gives, or in any way transfers to a minor any handgun as defined in G.S. 14-269.7, the person is guilty of a Class I felony and, in addition, shall forfeit the proceeds of any sale made in violation of this section. This section does not apply in any of the following circumstances:

(1) The handgun is lent to a minor for temporary use if the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(2) The handgun is transferred to an adult custodian pursuant to Chapter 33A of the General Statutes, and the minor does not take possession of the handgun except that the adult custodian may allow the minor temporary possession of the handgun in circumstances in which the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(3) The handgun is a devise or legacy and is distributed to a parent or guardian under G.S. 28A-22-7, and the minor does not take possession of the handgun except that the parent or guardian may allow the minor temporary possession of the handgun in circumstances in which the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 597, s. 2, effective October 1, 1994.

(b1) Defense. — It shall be a defense to a violation of this section if all of the following conditions are met:

(1) The person shows that the minor produced an apparently valid permit to receive the weapon, if such a permit would be required under G.S. 14-402 or G.S. 14-409.1 for transfer of the weapon to an adult.

(2) The person reasonably believed that the minor was not a minor.

(3) The person either:

a. Shows that the minor produced a drivers license, a special identification card issued under G.S. 20-37.7, a military identification card, or a passport, showing the minor's age to be at least the required age for purchase and bearing a physical description of the person named on the card reasonably describing the minor; or

b. Produces evidence of other facts that reasonably indicated at the time of sale that the minor was at least the required age. (1893, c. 514; Rev., s. 3832; C.S., s. 4440; 1985, c. 199; 1993, c. 259, s. 3; 1993, c. 539, s. 217; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 597, s. 2.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, and applicable to offenses committed on or after that date, in subsection (a) substituted "Sale of Weapons Other than Handguns" for "Offense" as the subsection catchline, substituted "a person sells, offers for sale, gives, or in any way transfers" for "any person shall sell, offer for sale, give or in any way dispose of," deleted "handgun as defined in G.S. 14-269.7, pistol" preceding "pistol cartridge," substituted "the person is" for "he shall be" and inserted "in addition"; added subsection (a1); deleted former subsection (b) regarding defense; and added subsection (b1).

## § 14-315.1. Storage of firearms to protect minors.

(a) Any person who resides in the same premises as a minor, owns or possesses a firearm, and stores or leaves the firearm (i) in a condition that the firearm can be discharged and (ii) in a manner that the person knew or should have known that an unsupervised minor would be able to gain access to the firearm, is guilty of a Class 1 misdemeanor if a minor gains access to the firearm without the lawful permission of the minor's parents or a person having charge of the minor and the minor:

(1) Possesses it in violation of G.S. 14-269.2(b);
(2) Exhibits it in a public place in a careless, angry, or threatening manner;
(3) Causes personal injury or death with it not in self defense; or
(4) Uses it in the commission of a crime.

(b) Nothing in this section shall prohibit a person from carrying a firearm on his or her body, or placed in such close proximity that it can be used as easily and quickly as if carried on the body.

(c) This section shall not apply if the minor obtained the firearm as a result of an unlawful entry by any person.

(d) "Minor" as used in this section means a person under 18 years of age who is not emancipated. (1993, c. 558, s. 2; 1994, Ex. Sess., c. 14, s. 11.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor if a minor gains" in the introductory language of subsection (a).

## § 14-315.2. Warning upon sale or transfer of firearm to protect minor.

(a) Upon the retail commercial sale or transfer of any firearm, the seller or transferor shall deliver a written copy of G.S. 14-315.1 to the purchaser or transferee.

(b) Any retail or wholesale store, shop, or sales outlet that sells firearms shall conspicuously post at each purchase counter the following warning in block letters not less than one inch in height the phrase: "IT IS UNLAWFUL TO STORE OR LEAVE A FIREARM THAT CAN BE DISCHARGED IN A MANNER THAT A REASONABLE PERSON SHOULD KNOW IS ACCESSIBLE TO A MINOR."

(c) A violation of subsection (a) or (b) of this section is a Class 1 misdemeanor. (1993, c. 558, s. 2; 1994, Ex. Sess., c. 14, s. 12.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in subsection (c).

## § 14-316. Permitting young children to use dangerous firearms.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-316.1. Contributing to delinquency and neglect by parents and others.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-317. Permitting minors to enter barrooms or billiard rooms.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-318. Exposing children to fire.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-318.1. Discarding or abandoning iceboxes, etc.; precautions required.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-318.2. Child abuse a Class 1 misdemeanor.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class 1 misdemeanor of child abuse.

(b) The Class 1 misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies. (1965, c. 472, s. 1; 1971, c. 710, s. 6; 1993, c. 539, s. 223; 1994, Ex. Sess., c. 14, s. 13; c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1994 Extra Session amendment by c. 14, s. 13, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 1" for "general" in the catchline of this section.

## § 14-318.4. Child abuse a felony.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-320.1. Transporting child outside the State with intent to violate custody order.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-321. Failing to pay minors for doing certain work.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 40.

## *Protection of the Family.*

## § 14-322. Abandonment and failure to support spouse and children.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-326.1. Parents; failure to support.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 41.

## *Alcoholic Beverages.*

### § 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous alcoholic beverages.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 44.

## *Regulation of Sales.*

### § 14-342. Selling or offering to sell meat of diseased animals.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-343. Unauthorized dealing in railroad tickets.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-344. Sale of admission tickets in excess of printed price.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-345: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(16), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-346. Sale of convict-made goods prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## §§ 14-346.1, 14-346.2: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(17), (18), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 45.

## *Regulation of Employer and Employee.*

## § 14-353. Influencing agents and servants in violating duties owed employers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-355. Blacklisting employees.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Request from Prospective Employer.** — Statements made about a former employee in response to a request from a prospective employer are privileged under this section; for this section to be violated, the statements to the prospective employer would have to be unsolicited. Friel v. Angell Care Inc., 113 N.C. App. 505, 440 S.E.2d 111 (1994).

## § 14-356: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(16), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-357: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(19), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 46.

## *Regulation of Landlord and Tenant.*

## § 14-358. Local: Violation of certain contracts between landlord and tenant.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 47.

## *Cruelty to Animals.*

### § 14-360. Cruelty to animals; construction of section.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-361. Instigating or promoting cruelty to animals.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-361.1. Abandonment of animals.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-362. Cock fighting.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-362.1. Animal fights, other than cock fights, and animal baiting.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-363. Conveying animals in a cruel manner.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-363.1. Living baby chicks or other fowl, or rabbits under eight weeks of age; disposing of as pets or novelties forbidden.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 49.

## *Protection of Livestock Running at Large.*

## § 14-366. Molesting or injuring livestock.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-367. Altering the brands of and misbranding another's livestock.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-368. Placing poisonous shrubs and vegetables in public places.

If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mock orange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a Class 2 misdemeanor. (1887, c. 338; Rev., s. 3318; C.S., s. 4496; 1969, c. 1224, s. 3; 1993, c. 539, s. 247; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — This section is reprinted to correct an error in the historical citation in the main pamphlet.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-369: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(20), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 50.

## *Protection of Letters, Telegrams, and Telephone Messages.*

## § 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 51.

## *Protection of Athletic Contests.*

### § 14-373. Bribery of players, managers, coaches, referees, umpires or officials.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-374. Acceptance of bribes by players, managers, coaches, referees, umpires or officials.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-377. Intentional losing of athletic contest or limiting margin of victory or defeat.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 51A.

## *Protection of Horse Shows.*

### § 14-380.1. Bribery of horse show judges or officials.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-380.2. Bribery attempts to be reported.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 52.

## *Miscellaneous Police Regulations.*

## § 14-381. Desecration of State and United States flag.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-382. Pollution of water on lands used for dairy purposes.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-384. Injuring notices and advertisements.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-385. Defacing or destroying public notices and advertisements.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-386: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(21), effective October 1, 1994.

**Editor's Note.** — Session Laws 1994, Extra Session, c. 14, s. 73, which repeals this section effective October 1, 1994, provides: "This act applies to offenses occurring on or after the effective date of this act. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-389: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(17), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-391. Usurious loans on household and kitchen furniture or assignment of wages.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-394. Anonymous or threatening letters, mailing or transmitting.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-395. Commercialization of American Legion emblem; wearing by nonmembers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-395.1. Sexual harassment.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## §§ 14-396, 14-397: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(18), (19), effective October 1, 1994.

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 34, which repeals this section effective October 1, 1994, provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

## § 14-398. Theft or destruction of property of public libraries, museums, etc.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-399. Littering.

**Local Modification.** — By virtue of Session Laws 1995, c. 169, the local modifications for Mecklenburg and the city of Charlotte by Session Laws 1983, c. 362 should be stricken from the main volume.

For additional local modifications to this section, see the main pamphlet.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-399.2. Certain plastic yoke and ring type holding devices prohibited.

**Editor's Note. —**
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-400. Tattooing prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401. Putting poisonous foodstuffs, antifreeze, etc., in certain public places, prohibited.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.1. Misdemeanor to tamper with examination questions.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.3. Inscription on gravestone or monument charging commission of crime.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.4. Identifying marks on machines and apparatus; application to Division of Motor Vehicles for numbers.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited.

It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a Class 2 misdemeanor.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the Counties of Alexander, Ashe, Avery, Bladen, Brunswick, Buncombe, Burke, Caldwell, Camden, Carteret, Caswell, Chatham, Chowan, Clay, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Franklin, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hoke, Iredell, Johnston, Lee, Lenoir, Madison, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Onslow, Pasquotank, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Surry, Transylvania, Union, Wake and Wayne. (1951, c. 314; 1953, cc. 138, 227, 328; 1955, cc. 55, 454; 1957, cc. 151, 166, 309, 355, 915; 1959, cc. 428, 1018; 1961, c. 271; 1969, c. 1224, s. 20; 1973, cc. 12, 195; 1975, cc. 331, 351; 1977, c. 335; 1993, c. 539, s. 275; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 596, s. 1.)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —** The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994 and applicable to offenses committed on or after that date, deleted "Bertie," "Gates," "Hertford," "Northhampton," "Vance," and "Warren" from the list in the third paragraph and added "Wayne."

## § 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.7. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.8. Refusing to relinquish party telephone line in emergency; false statement of emergency.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.9. Parking vehicle in private parking space without permission.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.10. Soliciting advertisements for official publications of law-enforcement officers' associations.

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective

date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.11. Distribution of certain food at Halloween and all other times prohibited.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.12. Soliciting charitable contributions by telephone.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.13. Failure to give right to cancel in off-premises sales.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-401.14. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

(a) If a person shall, because of race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act, he shall be guilty of a Class 1 misdemeanor.

(b) A person who assembles with one or more persons to teach any technique or means to be used to commit any act in violation of subsection (a) of this section is guilty of a Class 1 misdemeanor. (1991, c. 493, s. 1; 1993, c. 332, s. 1; c. 539, s. 283; 1994, Ex. Sess., c. 14, s. 14(b); c. 24, s. 14(c); 1995, c. 509, s. 10.)

**Editor's Note.** —

Session Laws 1994, Extra Session, c. 14, s. 14(a), effective October 1, 1994, repeals Session Laws 1993, c. 539, s. 283, which effective October 1, 1994, in this section as it read prior to amendment by Session Laws 1993, c. 322, s. 1, would have substituted "Class 1 misdemeanor" for former penalty provisions in present subsection (a).

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1994 Extra Session amendment by c. 14, s. 14(b), effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor punishable by imprisonment of up to two years, a fine, or both" in subsection (b).

The 1995 amendment, effective July 29, 1995, substituted "Class 1 misdemeanor" for "misdemeanor punishable by imprisonment up to two years, or a fine, or both" in subsection (a).

## ARTICLE 52A.

## *Sale of Weapons in Certain Counties.*

### § 14-402. Sale of certain weapons without permit forbidden.

**Applicability of this Article.** — Tyrrell was deleted from the list of counties excepted from this Article by Session Laws 1993 (Reg. Sess., 1994), c. 581, s. 1. Madison, Polk, and Yancey were deleted from the list by Session Laws 1993 (Reg. Sess., 1994), c. 634, ss. 1 and 2. Ashe was deleted from the list of counties by Session Laws 1995, c. 304, s. 1, effective June 20, 1995, and applicable to applications for permits filed on or after that date.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 14-403. Permit issued by sheriff; form of permit; expiration of permit.

The sheriffs of any and all counties of this State shall issue to any person, firm, or corporation in any county a license or permit to purchase or receive any weapon mentioned in this Article from any person, firm, or corporation offering to sell or dispose of the weapon. The license or permit shall expire five years from the date of issuance. The license or permit shall be in the following form:

North Carolina,
............. County.

I, .........., Sheriff of said County, do hereby certify that I have conducted a criminal background check of the applicant, ...... whose place of residence is .......... in .......... (or) in .... Township, ......... County, North Carolina, and have received no information to indicate that it would be a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun. The applicant has further satisfied me as to his, her (or) their good moral character. Therefore, a license or permit is issued to ......... to purchase one pistol from any person, firm or corporation authorized to dispose of the same.

This license or permit expires five years from its date of issuance.

This ......... day of .........., 19 .......

..........................................
Sheriff.

(1919, c. 197, s. 2; C.S., s. 5107; 1959, c. 1073, s. 2; 1981 (Reg. Sess., 1982), c. 1395, s. 3; 1995, c. 487, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 487, s. 5 provided in part "This act shall expire if the instant criminal history records check system as set out in House Bill 919, 1995 Regular Session, is enacted and is implemented by the General Assembly." House Bill 919 has not been enacted, and thus the contingency has not yet occurred.

**Effect of Amendments.** — The 1995 amendment, effective December 1, 1995, and applicable to permits or licenses applied for on or after that date, added "expiration of permit" in the catchline of this section; divided the former first sentence into the first through third sentences; in the present first sentence substituted "shall" for "are hereby authorized and directed to", and substituted "weapon" for "same, which said" at the end of the sentence, in the second sentence added "The" at the beginning of the sentence, and added "expire five years from the date of issuance"; in the third sentence added "The license or permit shall" and deleted "to wit" at the end of the sentence; rewrote the form set out in this section, and made stylistic changes.

## § 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

(a) Upon application, the sheriff shall issue the license or permit to a resident of that county unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident when the sheriff has done all of the following:

(1) Verified by a criminal history background investigation that it is not a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun. The sheriff shall determine the criminal history of any applicant by accessing computerized criminal history records as maintained by the State Bureau of Investigation and the Federal Bureau of Investigation, by conducting a national criminal history records check, and by conducting a criminal history check through the Administrative Office of the Courts.

(2) Fully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant.

(3) Fully satisfied himself or herself that the applicant desires the possession of the weapon mentioned for (i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.

(b) If the sheriff is not fully satisfied, the sheriff may, for good cause shown, decline to issue the license or permit and shall provide to the applicant within seven days of the refusal a written statement of the reason(s) for the refusal. An appeal from the refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final.

(c) A permit may not be issued to the following persons:

(1) One who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of

trade). However, a person who has been convicted of a felony in a court of any state or in a court of the United States and who is later pardoned may obtain a permit, if the purchase or receipt of a pistol or crossbow permitted in this Article does not violate a condition of the pardon.

(2) One who is a fugitive from justice.

(3) One who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802).

(4) One who has been adjudicated mentally incompetent or has been committed to any mental institution.

(5) One who is an alien illegally or unlawfully in the United States.

(6) One who has been discharged from the armed forces under dishonorable conditions.

(7) One who, having been a citizen of the United States, has renounced his or her citizenship.

(8) One who is subject to a court order that:

a. Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

b. Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner of the person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

c. Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

(d) Nothing in this Article shall apply to officers authorized by law to carry firearms if the officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties.

(e) The sheriff shall charge for the sheriff's services upon issuing the license or permit a fee of five dollars ($5.00).

(f) Each applicant for a license or permit shall be informed by the sheriff within 30 days of the date of the application whether the license or permit will be granted or denied and, if granted, the license or permit shall be immediately issued to the applicant. (1919, c. 197, s. 3; C.S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1; 1987, c. 518, s. 1; 1995, c. 487, s. 2.)

**Editor's Note.** — Session Laws 1995, c. 487, s. 5 provided in part "This act shall expire if the instant criminal history records check system as set out in House Bill 919, 1995 Regular Session, is enacted and is implemented by the General Assembly." House Bill 919 has not been enacted, and thus the contingency has not yet occurred.

**Effect of Amendments.** — The 1995 amendment, effective December 1, 1995, and applicable to permits or licenses applied for on or after that date, rewrote this section.

## § 14-408. Violation of § 14-406 or 14-407 a misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 14-409. Machine guns and other like weapons.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 53.

## *Sale of Weapons in Certain Other Counties.*

## §§ 14-409.1 through 14-409.9: Repealed by Session Laws 1995, c. 487, s. 4, effective December 1, 1995.

**Editor's Note.** — Session Laws 1995, c. 487, s. 5 provided: "This act becomes effective December 1, 1995, and applies to permits or licenses applied for on or after that date. This act shall expire if the instant criminal history records check system as set out in House Bill 919, 1995 Regular Session, is enacted and is implemented by the General Assembly." House Bill 919 has not been enacted, and thus the contingency has not yet occurred.

## ARTICLE 54.

## *Sale, etc., of Pyrotechnics.*

## § 14-410. Manufacture, sale and use of pyrotechnics prohibited; exceptions; sale to persons under the age of 16 prohibited.

(a) It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged; provided, further, that such written authority from the board of commissioners is not required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill; provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business.

(b) Notwithstanding the provisions of G.S. 14-414, it shall be unlawful for any individual, firm, partnership, or corporation to sell pyrotechnics as defined in G.S. 14-414 (2), (3), (4)c., (5), or (6) to persons under the age of 16. (1947, c. 210, s. 1; 1993 (Reg. Sess., 1994), c. 660, s. 3; 1995, c. 475, s. 1.)

**Effect of Amendments.** — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, inserted "; provided, further, that such written authority from the board of commissioners is not required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by the University of North Carolina or the University of North Carolina at Chapel Hill" preceding "provided, further, that it shall not be unlawful for a common carrier".

The 1995 amendment, effective December 1, 1995, and applicable to offenses committed on or after that date, added the subsection (a) designation, and added subsection (b).

## § 14-413. Permits for use at public exhibitions.

For the purpose of enforcing the provisions of this Article, the board of county commissioners of any county is hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. Provided that no such permit shall be required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill. (1947, c. 210, s. 4; 1993 (Reg. Sess., 1994), c. 660, s. 3.1; 1995, c. 509, s. 11.)

**Effect of Amendments.** — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, added the last sentence.

The 1995 amendment, effective July 29, 1995, in the first sentence, substituted "Article" for "article" and "is" for "are", and in the second sentence, substituted "The" for "the".

## § 14-415. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 54A.

## *The Felony Firearms Act.*

### § 14-415.1. Possession of firearms, etc., by felon prohibited.

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).

Every person violating the provisions of this section shall be punished as a Class G felon.

Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

(b) Prior convictions which cause disentitlement under this section shall only include:

(1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and

(2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.

(3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed. A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1; 1973, c. 1196; 1975, c. 870, ss. 1, 2; 1977, c. 1105, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1989, c. 770, s. 3; 1993, c. 539, s. 1245; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 487, s. 3; c. 507, s. 19.5(k).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra

Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1995, c. 487, s. 5 provided in part "This act shall expire if the instant criminal history records check system as set out in House Bill 919, 1995 Regular Session, is enacted and is implemented by the General Assembly." House Bill 919 has not been enacted, and thus the contingency has not yet occurred.

Session Laws 1995, c. 507, s. 1.1 provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments. —**

Session Laws 1995, c. 487, s. 3, effective December 1, 1995, and applicable to permits or licenses applied for on or after that date, in subsection (a) substituted "a felony" for "any crime set out in subsection (b) of this section", and deleted "within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later" from the end of the subsection; and in subsection (b) rewrote subdivision (b)(1), deleted subdivision (b)(2) regarding common law robbery and common law maim, in subdivision (b)(3) added "that occur before, on, or after December 1, 1995, and that are", substituted "subdivision (1)" for "subdivisions (1) and (2)", and substituted "one year" for "two years", substituted "one year" for "two years" in the next to last sentence, and in the last sentence added "of the defendant", added "by the defendant", and deleted "under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and" preceding "shall be prima facie evidence".

Session Laws 1995, c. 507, s. 19.5(k), effective December 1, 1995, and applicable to offenses committed on or after that date, substituted "Class G" for "Class H" in the second paragraph of subsection (a).

## CASE NOTES

**Construction with Other Provisions.** — Reading § 14-288.8 in pari materia with this section, it is clear that the footnote to § 14-288.8 which reads "nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or ... place of business" does not apply to weapons of mass death and destruction; North Carolina did not intend to restore to its ex-felons the right to possess such weapons within their own homes, in contravention of the general federal prohibition against felons possessing firearms. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

**Sawed-Off Shotguns.** — With limited and specific exceptions, no one in North Carolina, ex-felon or otherwise, may possess, store or acquire a sawed-off shotgun for any reason or under any circumstance. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

**Prosecution for Possession of Firearm by Ex-Felon in Violation of 18 U.S.C. § 922(g)(1). —**

Felon convicted of manslaughter whose civil rights were restored was entitled to possess firearms or any type of firearm in his home or business, and all restrictions on his possession of firearms ceased after five years. As a result, the district court erred in denying defendant's motion to dismiss count charging him with violating 18 U.S.C. § 922(g)(1) by possessing firearms in his home. United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993), cert. denied, — U.S. —, 114 S. Ct. 698, 126 L. Ed. 2d 665 (1994).

Because defendant's underlying state felony conviction occurred within five years of a firearm offense, the defendant's civil rights could not have been fully restored, and the government proved a firearm possession violation despite the fact that it did not independently establish that defendant's civil rights had not been restored at the time of his firearm possession. United States v. Thomas, 52 F.3d 82 (4th Cir. 1995).

## § 14-415.3. Possession of a firearm or weapon of mass destruction by persons acquitted of certain crimes by reason of insanity or persons determined to be incapable to proceed prohibited.

(a) It is unlawful for the following persons to purchase, own, possess, or have in the person's custody, care, or control, any firearm or any weapon of mass death and destruction as defined by G.S. 14-288.8(c):

(1) A person who has been acquitted by reason of insanity of any crime set out in G.S. 14-415.1(b) or any violation of G.S. 14-33(b)(1), 14-33(b)(8), or 14-34.

(2) A person who has been determined to lack capacity to proceed as provided in G.S. 15A-1002 for any crime set out in G.S. 14-415.1(b) or any violation of G.S. 14-33(b)(1), 14-33(b)(8), or 14-34.

(b) A violation of this section is a Class H felony. Any firearm or weapon of mass death and destruction lawfully seized for a violation of this section shall be forfeited to the State and disposed of as provided in G.S. 15-11.1. (1994, Ex. Sess., c. 13, s. 1.)

**Editor's Note.** — Session Laws 1994, Extra Session, c. 13, s. 2 makes this section effective May 1, 1994, and provides that the criminal violation created by this section is applicable to offenses committed on or after the effective date of the act.

## §§ 14-415.4 through 14-415.9: Reserved for future codification purposes.

## Article 54B.

## *Concealed Handgun Permit.*

## § 14-415.10. Definitions.

The following definitions apply to this Article:

(1) Carry a concealed handgun. — The term includes possession of a concealed handgun.

(2) Handgun. — A firearm that has a short stock and is designed to be held and fired by the use of a single hand.

(3) Permit. — A concealed handgun permit issued in accordance with the provisions of this Article. (1995, c. 398, s. 1.)

**Editor's Note.** — Session Laws 1995, c. 398, s. 3, provides that this article is effective December 1, 1995, and is applicable to offenses committed on or after that date.

Session Laws 1995, c. 542, the Studies Act of 1995, provides in s. 5.1 that the Governor's Crime Commission shall study the effects of the enactment of Article 54B of Chapter 14 of the General Statutes. The Commission shall review the number of permits denied, issued and revoked, shall review data on the use of concealed handguns by those having permits, and shall attempt to determine the effect of Article 54B on crime and on public safety.

## § 14-415.11. Permit to carry concealed handgun; scope of permit.

(a) Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer.

(b) The sheriff shall issue a permit to carry a concealed handgun to a person who qualifies for a permit under G.S. 14-415.12. The permit shall be valid throughout the State for a period of four years from the date of issuance.

(c) A permit does not authorize a person to carry a concealed handgun in the areas prohibited by G.S. 14-269.2, 14-269.3, 14-269.4, and 14-277.2, in an area prohibited by rule adopted under G.S. 120-32.1, in any area prohibited by 18 U.S.C. § 922 or any other federal law, in a law enforcement or correctional facility, in a building housing only State or federal offices, in an office of the State or federal government that is not located in a building exclusively occupied by the State or federal government, a financial institution, or any other premises where notice that carrying a concealed handgun is prohibited by the posting of a conspicuous notice or statement by the person in legal possession or control of the premises. It shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in his body any alcohol or in his blood a controlled substance previously consumed, but a person does not violate this condition if a controlled substance in his blood was lawfully obtained and taken in therapeutically appropriate amounts.

(d) A person who is issued a permit shall notify the sheriff who issued the permit of any change in the person's permanent address within 30 days after the change of address. If a permit is lost or destroyed, the person to whom the permit was issued shall notify the sheriff who issued the permit of the loss or destruction of the permit. A person may obtain a duplicate permit by submitting to the sheriff a notarized statement that the permit was lost or destroyed and paying the required duplicate permit fee. (1995, c. 398, s. 1; c. 507, s. 22.1(c); c. 509, s. 135.3(e).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1995, c. 507, s. 22.1(c), effective December 1, 1995, substituted "four" for "three" in the second sentence of subsection (b).

Session Laws 1995, c. 509, s. 135.3(e), effective December 1, 1995, inserted "in an area prohibited by rule adopted under G.S. 120-32.1" in subsection (c).

## § 14-415.12. Criteria to qualify for the issuance of a permit.

(a) The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria:

(1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer immediately preceding the filing of the application.

(2) The applicant is 21 years of age or older.

(3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.

(4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:

a. The North Carolina Criminal Justice Education and Training Standards Commission,

b. The National Rifle Association, or

c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.

(5) The applicant is not disqualified under subsection (b) of this section.

(b) The sheriff shall deny a permit to an applicant who:

(1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.

(2) Is under indictment or against whom a finding of probable cause exists for a felony.

(3) Has been adjudicated guilty in any court of a felony.

(4) Is a fugitive from justice.

(5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.

(6) Is currently, or has been previously adjudicated or administratively determined to be, lacking mental capacity or mentally ill.

(7) Is or has been discharged from the armed forces under conditions other than honorable.

(8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under

Article 8 of Chapter 14 of the General Statutes, or a violation of a misdemeanor under G.S. 14-225.2, 14-226.1, 14-258.1, 14-269.2, 14-269.3, 14-269.4, 14-269.6, 14-276.1, 14-277, 14-277.1, 14-277.2, 14-277.3, 14-281.1, 14-283, 14-288.2, 14-288.4(a)(1) or (2), 14-288.6, 14-288.9, 14-288.12, 14-288.13, 14-288.14, 14-318.2, or 14-415.21(b).

(9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.

(10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.

(11) Has been convicted of an impaired driving offense under G.S. 20-138.1, 20-138.2, or 20-138.3 within three years prior to the date on which the application is submitted. (1995, c. 398, s. 1; c. 509, s. 135.3(d).)

**Effect of Amendments.** — Session Laws 1995, c. 509, s. 135.3(d), effective December 1, 1995, rewrote subdivisions (b)(2) and (b)(3); and substituted "14-415.21(b)" for "14-415.19(a), unless five years has elapsed since disposition or pardon has occurred prior to the date on which the application is submitted" in subdivision (b)(8).

## § 14-415.13. Application for a permit; fingerprints.

(a) A person shall apply to the sheriff of the county in which the person resides to obtain a concealed handgun permit. The applicant shall submit to the sheriff all of the following:

(1) An application, completed under oath, on a form provided by the sheriff.

(2) A nonrefundable permit fee.

(3) A full set of fingerprints of the applicant administered by the sheriff.

(4) An original certificate of completion of an approved course, adopted and distributed by the North Carolina Criminal Justice Education and Training Standards Commission, signed by the certified instructor of the course attesting to the successful completion of the course by the applicant which shall verify that the applicant is competent with a handgun and knowledgeable about the laws governing the carrying of a concealed handgun and the use of deadly force.

(5) A release, in a form to be prescribed by the Administrative Office of the Courts, that authorizes and requires disclosure to the sheriff of any records concerning the mental health or capacity of the applicant.

(b) The sheriff shall submit the fingerprints to the State Bureau of Investigation for a records check of State and national databases. The State Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation as necessary. The cost of processing the set of fingerprints shall be charged to an applicant as provided by G.S. 14-415.19. (1995, c. 398, s. 1; c. 507, ss. 22.2(a), 22.1(b).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1995, c. 507, ss. 22.1(b) and 22.2(a), effective December 1, 1995, in subdivision (a)(3) substituted "the sheriff" for "a law enforcement agency of this State"; and deleted the last sentence of subsection (b), regarding retention of fingerprints for future use in the event the permit is renewed.

## § 14-415.14. Application form to be provided by sheriff; information to be included in application form.

(a) The sheriff shall make permit applications readily available at the office of the sheriff or at other public offices in the sheriff's jurisdiction. The permit application shall be in triplicate, in a form to be prescribed by the Administrative Office of the Courts, and shall include the following information with regard to the applicant: name, address, physical description, signature, date of birth, social security number, military status, and the drivers license number or State identification card number of the applicant if used for identification in applying for the permit.

(b) The permit application shall also contain a warning substantially as follows:

"CAUTION: Federal law and State law on the possession of handguns and firearms differ. If you are prohibited by federal law from possessing a handgun or a firearm, you may be prosecuted in federal court. A State permit is not a defense to a federal prosecution." (1995, c. 398, s. 1.)

## § 14-415.15. Issuance or denial of permit.

(a) Except as permitted under subsection (b) of this section, within 90 days after receipt of the items listed in G.S. 14-415.13 from an applicant, the sheriff shall either issue or deny the permit. The sheriff may conduct any investigation necessary to determine the qualification or competency of the person applying for the permit, including record checks.

(b) Upon presentment to the sheriff of the items required under G.S. 14-415.13(a)(1), (2), and (3), the sheriff may issue a temporary permit for a period not to exceed 90 days to a person who the sheriff reasonably believes is in an emergency situation that may constitute a risk of safety to the person, the person's family or property. The temporary permit may not be renewed and may be revoked by the sheriff without a hearing.

(c) A person's application for a permit shall be denied only if the applicant fails to qualify under the criteria listed in this Article. If the sheriff denies the application for a permit, the sheriff shall, within 90 days, notify the applicant in writing, stating the grounds for denial. An applicant may appeal the denial, revocation, or nonrenewal of a permit by petitioning a district court judge of the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal. The determination by the court shall be final. (1995, c. 398, s. 1.)

## § 14-415.16. Renewal of permit.

The holder of a permit shall apply to renew the permit at least 30 days prior to its expiration date by filing with the sheriff of the county in which the person resides a renewal form provided by the sheriff's office, a notarized affidavit stating that the permittee remains qualified under the criteria provided in this Article, a newly administered full set of the permittee's fingerprints, and a renewal fee. Upon receipt of the completed renewal application, including the permittee's fingerprints, and the appropriate payment of fees, the sheriff shall determine if the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12. The permittee's criminal history shall be updated, and the sheriff may waive the requirement of taking another firearms safety and training course. If the permittee applies for a renewal of the permit within 30 days of its expiration date and if the permittee remains qualified to have a permit under G.S. 14-415.12, the sheriff shall renew the permit. (1995, c. 398, s. 1; c. 507, s. 22.2(b).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1995, c. 507, s. 22.2(b), effective December 1, 1995, added "a newly administered full set of the permittee's fingerprints" in the first sentence, and substituted "application, including the permittee's fingerprints, and the" for "application and" in the second sentence.

## § 14-415.17. Permit; sheriff to retain and make available to law enforcement agencies a list of permittees.

The permit shall be in a certificate form, as prescribed by the Administrative Office of the Courts, that is approximately the size of a North Carolina drivers license. It shall bear the signature, name, address, date of birth, and social security number of the permittee, and the drivers license identification number used in applying for the permit. The sheriff shall maintain a listing of those persons who are issued a permit and any pertinent information regarding the issued permit. The permit information shall be available upon request to all State and local law enforcement agencies.

Within five days of the date a permit is issued, the sheriff shall send a copy of the permit to the State Bureau of Investigation. The State Bureau of Investigation shall make this information available to law enforcement officers and clerks of court on a statewide system. (1995, c. 398, s. 1.)

## § 14-415.18. Revocation or suspension of permit.

(a) The sheriff of the county where the permit was issued or the sheriff of the county where the person resides may revoke a permit subsequent to a hearing for any of the following reasons:

(1) Fraud or intentional or material misrepresentation in the obtaining of a permit.

(2) Misuse of a permit, including lending or giving a permit to another person, duplicating a permit, or using a permit with the intent to unlawfully cause harm to a person or property.

(3) The doing of an act or existence of a condition which would have been grounds for the denial of the permit by the sheriff.

(4) The violation of any of the terms of this Article.

(5) The applicant is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the applicant from initially receiving a permit.

A permittee may appeal the revocation, or nonrenewal of a permit by petitioning a district court judge of the district in which the applicant resides. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal.

(b) The court may suspend a permit as part of and for the duration of any orders permitted under Chapter 50B of the General Statutes. (1995, c. 398, s. 1.)

## § 14-415.19. Fees.

(a) The permit fees assessed under this Article are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer to be remitted or credited by the county finance officer in accordance with the provisions of this subsection. The permit fees are as follows:

| | |
|---|---|
| Application fee | $80.00 |
| Renewal fee | $80.00 |
| Duplicate permit fee | $15.00 |

The county finance officer shall remit sixty dollars ($60.00) of each application or renewal fee to the North Carolina Department of Justice for the costs of State and federal criminal record checks performed in connection with processing applications and for the implementation of the provisions of this Article. The remaining twenty dollars ($20.00) of each application or renewal fee shall be used by the sheriff to pay the costs of administering this Article and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only.

(b) An additional fee, not to exceed ten dollars ($10.00), shall be collected by the sheriff from an applicant for a permit to pay for the costs of processing the applicant's fingerprints. This fee shall be retained by the sheriff. (1995, c. 398, s. 1; c. 507, s. 22.1(a).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1 provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 22(b), provides: "The Department of Justice may use, for each year of the 1995-97 biennium, the sum of up to three hundred seventy-nine thousand two hundred eighty-seven dollars ($379,287) to add 15 positions in the State Bureau of Investigation to facilitate record checks for concealed weapons permits. The Office of State Budget and Management may adjust the allotment of appropriations to the Department of Justice until receipts are realized. If the number of criminal record checks performed by the Department of Justice falls below the level of 10,000 checks per one and one-half positions, the number of positions performing records checks shall be reduced by the Department accordingly."

Session Laws 1995, c. 507, s. 22(c), provides: "The Department of Justice may charge a fee for the reasonable costs of the firearms safety courses required for a concealed weapon permit. The Department of Justice may use up to one hundred thousand dollars ($100,000) of its State appropriations to pay the costs of developing standards and implementing firearms safety courses until receipts from the courses are sufficient and available to pay the cost of those courses."

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1995, c. 507, s. 22.1(a), effective December 1, 1995, in subsection (a), in the first paragraph substituted "to be remitted or credited by the county finance officer in accordance with the provisions of this subsection" for "to be used to pay the costs of the criminal record checks and investigations required under this Article" in the second sentence, and in the list of fees following the last sentence twice substituted "$80.00" for "$50.00", and added the second paragraph; and in subsection (b) added "by the sheriff" in the first sentence, and substituted "sheriff" for "law enforcement office that processes the fingerprints".

## § 14-415.20. No liability of sheriff.

A sheriff who issues or refuses to issue a permit to carry a concealed handgun under this Article shall not incur any civil or criminal liability as the result of the performance of the sheriff's duties under this Article. (1995, c. 398, s. 1.)

## § 14-415.21. Violations of this Article punishable as an infraction and a Class 2 misdemeanor.

(a) A person who has been issued a valid permit who is found to be carrying a concealed handgun without the permit in the person's possession or who fails to disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun, as required by G.S. 14-415.11, shall be guilty of an infraction for the first offense and shall be punished in accordance with G.S. 14-3.1. In lieu of paying a fine for the first offense, the person may surrender the permit. Subsequent offenses for failing to carry a valid permit or for failing to make the necessary disclosures to a law enforcement officer as required by G.S. 14-415.11 shall be punished in accordance with subsection (b) of this section.

(b) A person who violates the provisions of this Article other than as set forth in subsection (a) of this section is guilty of a Class 2 misdemeanor. (1995, c. 398, s. 1.)

## § 14-415.22. Construction of Article.

This Article shall not be construed to require a person who may carry a concealed handgun under the provisions of G.S. 14-269(b) to obtain a concealed handgun permit. (1995, c. 398, s. 1.)

## § 14-415.23. Statewide uniformity.

It is the intent of the General Assembly to prescribe a uniform system for the regulation of legally carrying a concealed handgun. To insure uniformity, no political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules, or regulations concerning legally carrying a concealed handgun. A unit of local government may adopt an ordinance to permit the posting of a prohibition against carrying a concealed handgun, in accordance with G.S. 14-415.11(c), on local government buildings, their appurtenant premises, and parks. (1995, c. 398, s. 1.)

## ARTICLE 55.

## *Handling of Poisonous Reptiles.*

### § 14-422. Violation made misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 56.

## *Debt Adjusting.*

### § 14-424. Engaging, etc., in business of debt adjusting a misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 58.

## *Records, Tapes and Other Recorded Devices.*

### § 14-435. Recorded devices to show true name and address of manufacturer.

#### CASE NOTES

**Payment of Attorneys' Fees.** — Plaintiffs who filed federal claim to recover statutory damages for the infringing activity of defendants, justifiably seeking protection of their rights under the law, were entitled to attorney's fees where defendants were convicted in state court for failure to show the true name and address of the manufacturer on packaging on certain sound recordings; defendants' criminal activity supported a finding of bad faith and wilfulness in the infringement of plaintiff's copyrights. Arista Records v. Tysinger, 867 F. Supp. 345 (M.D.N.C. 1994).

## § 14-437. Violation of Article; penalties.

**Editor's Note.** —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Payment of Attorneys' Fees.** — Plaintiffs who filed federal claim to recover statutory damages for the infringing activity of defendants, justifiably seeking protection of their rights under the law, were entitled to attorney's fees where defendants were convicted in state court for failure to show the true name and address of the manufacturer on packaging on certain sound recordings; defendants' criminal activity supported a finding of bad faith and wilfulness in the infringement of plaintiff's copyrights. Arista Records v. Tysinger, 867 F. Supp. 345 (M.D.N.C. 1994).

## Article 59.

## *Public Intoxication.*

## § 14-444. Intoxicated and disruptive in public.

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 60.

## *Computer-Related Crime.*

## § 14-453. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Access" means to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network.

(1a) "Authorization" means having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.

(2) "Computer" means an internally programmed, automatic device that performs data processing or telephone switching.

(3) "Computer network" means the interconnection of communication systems with a computer through remote termi-

nals, or a complex consisting of two or more interconnected computers or telephone switching equipment.

(4) "Computer program" means an ordered set of data that are coded instructions or statements that when executed by a computer cause the computer to process data.

(5) "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer, computer system, or computer network.

(6) "Computer system" means at least one computer together with a set of related, connected, or unconnected peripheral devices.

(6a) "Data" means a representation of information, facts, knowledge, concepts, or instructions prepared in a formalized or other manner and intended for use in a computer, computer system, or computer network. Data may be embodied in any form including, but not limited to, computer printouts, magnetic storage media, and punch cards, or may be stored internally in the memory of a computer.

(7) "Financial instrument" includes any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card or marketable security, or any electronic data processing representation thereof.

(8) "Property" includes financial instruments, information, including electronically processed or produced data, and computer software and computer programs in either machine or human readable form, and any other tangible or intangible item of value.

(8a) "Resource" includes peripheral devices, computer software, computer programs, and data, and means to be a part of a computer, computer system, or computer network.

(9) "Services" includes computer time, data processing and storage functions. (1979, c. 831, s. 1; 1993 (Reg. Sess., 1994), c. 764, s. 1.)

**Effect of Amendments.** — The 1993 (Reg. Sess., 1994) amendment, effective December 1, 1994, and applicable to offenses committed on or after that date, rewrote this section.

## § 14-454. Accessing computers.

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any computer, computer system, computer network, or any part thereof, for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, unless the object of the scheme or artifice is to obtain educational testing material, a false educational testing score, or a false academic or vocational grade, or

(2) Obtaining property or services other than educational testing material, a false educational testing score, or a false academic or vocational grade for a person, by means of false or fraudulent pretenses, representations or promises.

A violation of this subsection is a Class G felony if the fraudulent scheme or artifice results in damage of more than one thousand dollars ($1,000), or if the property or services obtained are worth more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any computer, computer system, or computer network for any purpose other than those set forth in subsection (a) above, is guilty of a Class 1 misdemeanor.

(c) For the purpose of this section, the term "accessing or causing to be accessed" includes introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 19; 1981, cc. 63, 179; 1993, c. 539, s. 293; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1.)

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —** The 1993 (Reg. Sess., 1994) amendment, effective December 1, 1994, and applicable to offenses committed on or after that date, in subsection (a) substituted "It is unlawful to" for "A person is guilty of a Class H felony if he," substituted "access or cause" for "accesses or causes"; substituted "a person" for "himself or another" in subdivision (a)(2); added the last paragraph of subsection (a); substituted "or computer network" for "computer network, or any part thereof" in subsection (b); and added subsection (c).

## § 14-455. Damaging computers, computer systems, computer networks, and resources.

(a) It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(b) This section applies to alteration, damage, or destruction effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 20; 1981, cc. 63, 179; 1993, c. 539, s. 294; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 1995, c. 509, s. 12.)

**Editor's Note. —** Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments. —** The 1993 (Reg. Sess., 1994) amendment, effective December 1, 1994, and applicable to offenses committed on or after that date, rewrote this section.

The 1995 amendment, effective July 29, 1995, deleted "Class 1" following subsection (a).

## § 14-456. Denial of computer services to an authorized user.

(a) Any person who willfully and without authorization denies or causes the denial of computer, computer system, or computer network services to an authorized user of the computer, computer system, or computer network services is guilty of a Class 1 misdemeanor.

(b) This section also applies to denial of services effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer system, or computer network. (1979, c. 831, s. 1; 1993, c. 539, s. 295; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1.)

**Editor's Note.** — The section above was amended by Session Laws 1993 (Reg. Sess., 1994), c. 764, s. 1 in the coded bill drafting format provided by § 120-20.1. The act failed to incorporate the changes in subsection (a) made by Session Laws 1993, c. 539. Subsection (a) is set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** —

The 1993 (Reg. Sess., 1994) amendment, effective December 1, 1994, and applicable to offenses committed on or after that date, rewrote this section.

## STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1995*

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
*Attorney General of North Carolina*

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1998*

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1998 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

*Attorney General of North Carolina*

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